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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

STATE OF NEBRASKA, PETITIONER,

v.

CENTRAL INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMMISSION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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108 pp

QUESTION PRESENTED

Whether a State waives its Eleventh Amendment sovereign immunity from a suit seeking damages and other retrospective relief in federal court by entering into a multistate compact that authorizes only prospective relief against the State and only in "any court that has jurisdiction"?

PARTIES TO THE PROCEEDING

The Eighth Circuit consolidated two separate cases in issuing its opinion. In Appeal No. 99-4263, the sole plaintiff-appellee was the Central Interstate Low-Level Radioactive Waste Commission, while the only defendant-appellant was the State of Nebraska.

In Appeal No. 99-4265, the plaintiffs-appellees were: Entergy Arkansas, Inc.; Entergy Gulf States, Inc.; Entergy Louisiana, Inc.; Wolf Creek Nuclear Operating Corporation; Omaha Public Power District; and US Ecology, Inc. The defendants-appellants included the State of Nebraska, the Nebraska Department of Environmental Quality, the Nebraska Department of Health and Human Services Regulation & Licensure, Randolph Wood, Jay Ringenberg, David Schor, and Cheryl Rogers.

Certiorari is being sought here only from the Eighth Circuit's decision in Appeal No. 99-4263. Thus, the only petitioner in this proceeding is the State of Nebraska. The only respondent is the Central Interstate Low-Level Radioactive Waste Commission.

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PETITION FOR A WRIT OF CERTIORARI

The State of Nebraska respectfully petitions this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the Eighth Circuit rejecting the State's claim of Eleventh Amendment sovereign immunity.

OPINIONS BELOW

The decision of the Eighth Circuit affirming a district court denial of the State's dismissal motion based on sovereign immunity (App. 1a-22a) is reported at 241 F.3d 979. The district court's opinion (App. 24a-47a) is reported at 68 F. Supp. 2d 1093.

STATEMENT OF JURISDICTION

The Eighth Circuit issued its decision on March 8, 2001. The court denied Petitioner's timely-filed petition for rehearing/rehearing en banc on April 17, 2001. (App. 23a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AT ISSUE

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

STATEMENT OF THE CASE

Confronted with a perceived inadequate number of disposal sites for the growing amount of low-level radioactive waste produced in this country, Congress in 1980 enacted the Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (codified as amended at 42 U.S.C. §§ 2021b-2021d). In adopting the legislation, Congress determined that the disposal of such waste could be accomplished most safely and efficiently on a regional basis, and, to that end, promoted the formation of interstate compacts to oversee the waste generated within member States.

Following passage of this 1980 Act, the States of Nebraska, Arkansas, Louisiana, Oklahoma, and Kansas entered into an agreement known as the Central Interstate Low-Level Radioactive Waste Compact ("the Compact"). The Nebraska legislature approved the Compact in 1983, thereby making it part of Nebraska law. Congress, acting pursuant to Article I, Section 10, Clause 3 of the Constitution, subsequently consented to the Compact, as submitted, in 1986 in the Omnibus

Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. No. 99-240, 99 Stat. 1842, 1859.

The Compact negotiated by the States established a Commission – the Central Interstate Low-Level Radioactive Waste Commission – as its governing body, and endowed it with authority to take limited action against member states to enforce the Compact. As relevant here, the Compact provides that:

- the Commission may initiate "any proceedings or appear as an intervenor or party in interest before any court of law, or any Federal, state or local agency, board or commission that has jurisdiction over any matter arising under or relating to the terms or the provisions of this compact." Art. IV(e) (Add. 29)[1]
- the Commission shall "require all party states and other persons to perform their duties and obligations arising under this compact by an appropriate action in any forum designated in section e. of Article IV." Art. IV(m)(8) (Add. 31)
- the Commission shall direct the appropriate State "to process all applications for permits and licenses required for the development and operation of any regional facility or facilities within a reasonable period from the time that a completed application is submitted." Art. V(e)(2) (Add. 32)
- the Commission "may, by two-thirds affirmative vote of its membership, revoke the membership of any party state which, after notice and hearing, shall be found to have arbitrarily or capriciously denied or delayed the issuance of a license or

[1] "Add." refers to the Addendum of the State of Nebraska's Opening Brief in the Eighth Circuit in Appeal No. 99-4263.

permit to any person authorized by the Commission to apply for such license or permit. Revocation shall be in the same manner as provided for in section e. of Article VII." Art. V(g) (Add. 32)

- "Any party state which fails to comply with the terms of this compact or fulfill its obligations hereunder may, after notice and hearing, have its privileges suspended or membership in the compact revoked by the Commission." Art. VII(e) (Add. 33)

A. License Dispute Precipitating the Instant Action

In December 1989, no member State having volunteered to erect a waste disposal site within its borders, the Commission selected Nebraska as the first "Host State" for such a facility. CAA22.[2] The Commission contracted with US Ecology, Inc. ("USE") to file a license application, prosecute that application through the State's administrative review process, and, if the license was approved, construct and operate the facility. *Id.* USE filed its application in July 1990, and it was subsequently amended several times in the course of a lengthy and detailed technical evaluation.[3]

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[2] "CAA" refers to the State Appellants' Consolidated Appendix in the Eighth Circuit.

[3] In January 1993, the State issued a Notice of Intent to Deny USE's license application, grounded largely on the fact that the site selected by USE included "wetlands" in contravention of the State's regulatory regime. CAA26-27. USE filed a petition challenging the denial in a "contested case" administrative proceeding under Nebraska law. CAA27. Following negotiations, however, USE voluntarily withdrew its pending administrative challenge in August 1993 in favor of filing an amended license application that reconfigured its original site proposal so as to eliminate the "wetlands" portion. CAA28. USE's amended application

(*footnote continued on next page*)

Nebraska regulations required USE, as the applicant, to reimburse the State for related license review costs. CAA22. Aside from an initial commitment of its own funds, USE looked primarily to the Commission to meet the funding obligations and, by contract, the Commission assumed responsibility for covering the bulk of these costs. CAA23. The Commission, however, neither used, nor planned to use, any of its own funds. Nor did it turn to the other member States. Instead, it entered into discrete funding agreements with five nuclear waste generators – Entergy Arkansas, Inc., Entergy Gulf States, Inc., Entergy Louisiana, Inc., Wolf Creek Nuclear Operating Corp., and the Omaha Public Power District (collectively, "the Utilities") – whereby the Utilities would pay USE's pre-licensing costs in return for credits against future fees they might incur for use of the waste disposal facility if it became operational. CAA23-24.

Draft staff-level reports about the adequacy of USE's application were released in October 1997. CAA31. After reviewing numerous public comments and holding extended hearings, the State reviewing agencies,[4] in August 1998, indicated that the State planned to deny the amended license application on several grounds. *Id.* Another round of public comments and hearings followed, as required by the applicable regulations. In December 1998, the State issued a formal denial of USE's application. *Id.* USE responded by filing an administrative appeal (*i.e.*, a "contested case" petition) challenging the license denial and seeking further agency review. *Id.*

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was not completed until July 1995, at which time the State commenced its formal review. CAA29.

[4] The license application was reviewed jointly by the Nebraska Department of Environmental Quality (NDEQ) and the Nebraska Department of Health and Human Services Regulation & Licensure (NDHHS).

B. The Instant Lawsuit

At the time that USE filed its administrative appeal, the Utilities initiated a federal lawsuit against the State of Nebraska, its reviewing agencies, four State officials (in both their individual and official capacities) who had participated in the license review process, and the Commission.[5] CAA17. Their complaint alleged that the State intentionally delayed, impeded, and ultimately denied USE's license application on improper political grounds, all in violation of the "good faith" provision in Art. III(f) of the Compact. This section states: "Each *party state* has the right to rely on the good faith performance of each other party state." Add. 28 (emphasis added).

Just over a month after the Utilities filed their case, the Commission was granted leave of court to re-align itself as a plaintiff and file its own claims exclusively against the State.[6] CAA67-69. The Commission's complaint, which incorporates the allegations of the Utilities, is grounded solely on Nebraska's purported Compact violations, and requests: (i) a declaratory judgment that the State breached the "good faith" provision of the Compact; (ii) approximately $80 million in damages, which represents the amount of money the Utilities advanced the Commission to cover USE's pre-licensing costs; (iii) a permanent revocation of the State's licensing authority over the low-level radioactive waste facility; and (iv) reassignment of such authority to either a federal agency or the federal court. CAA63-66.

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[5] USE later received leave from the court to intervene in the case and filed its own complaint mirroring that of the Utilities. CAA74. In light of the Eighth Circuit's ruling below, the claims of neither USE nor the Utilities are at issue here.

[6] The Commission recently amended its complaint to add various State officers in their *official* capacities. This amendment has no effect on the arguments advanced in this petition.

Both the Commission and Utilities later filed motions for a preliminary injunction to enjoin the administrative "contested case" proceeding commenced by USE, and to prevent the State from obtaining or using any funds from the Utilities or USE in the license review process. CAA7, 10. They insisted that the State's administrative review process was too politically tainted to protect their interests.

The State defendants opposed both motions on Eleventh Amendment and other grounds. Following the Utilities' withdrawal – after argument – of their preliminary injunction motion, the district court granted the preliminary injunction motion of the Commission. 46 F. Supp. 2d 977. Explicitly declining to address the impact of the Eleventh Amendment on the Commission's claims for damages, the trial court held that the State had waived immunity from claims seeking prospective equitable relief. *Id.* at 995.

The State pursued an interlocutory appeal to the Eighth Circuit. It, and the other named defendants, also filed motions to dismiss the several complaints in the district court.[7] CAA70. After briefing and oral argument, the appellate court upheld the preliminary injunction order. App. 48a. With respect to the Eleventh Amendment issue, the court of appeals held that Nebraska waived its immunity from a Commission suit in federal court seeking preliminary injunctive relief to insure enforcement of Compact obligations, including, in this instance, the "good faith" performance provision in Article III(f). App. 61a-65a. Like the district court, the circuit court placed principal reliance on Compact Articles IV(m)(8) and IV(e). Article IV(m)(8) states that the Commission shall "require all party states and other persons *to perform* their duties and obligations arising under this

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[7] The defendant State officials moved to dismiss based on (i) plaintiffs' failure to state a claim upon which relief may be granted, and (ii) qualified immunity. CAA70. In light of the Eighth Circuit's remand ruling below, those claims are not at issue in this petition.

compact by an appropriate action in any forum designated in section e. of Article IV." (emphasis added). Article IV(e), in turn, provides that "[t]he Commission may initiate any proceedings or appear as intervenor or party in interest before *any court of law*, or any Federal, state, or local agency board or Commission *that has jurisdiction* over any matter arising under or relating to the terms or the provisions of this compact." (emphasis added).

The court of appeals found that these two provisions combined to amount to a waiver of at least "a portion" of the State's Eleventh Amendment sovereign immunity, and thus were sufficient to sustain the Commission's request for preliminary injunctive relief against the State. App. 65a. It likened the preliminary injunction request to the relief available in any event against the State officials under *Ex parte Young*, 209 U.S. 123 (1908). App. 64a-65a. Moreover, reasoning that the State's sovereign immunity defense could ultimately preclude recovery of the claimed money damages, the Eighth Circuit further held that the Commission satisfied the irreparable injury showing it needed to make. App. 66a-69a.

While the preceding appeal was still pending, the district court took up and rejected Nebraska's motion to dismiss. The trial court first held that congressional consent to the formation of an interstate compact undermined the State's claim to Eleventh Amendment immunity. App. 33a-38a. Selectively quoting clauses and phrases from the Compact, the district court determined that Congress had conditioned its consent to the Compact on the Commission's ability to sue member States in "any forum" or "any court of law," thereby negating any Eleventh Amendment impediments. App. 37a-38a. The trial judge observed that "a signatory state has no immunity from suit by a Compact Clause creation because that state had no sovereignty (power) over the enforcement mechanism chosen by Congress." App. 36a.

The district court further held that, even if the Eleventh Amendment was applicable, Nebraska, by entering into the

Compact, *waived* its sovereign immunity from actions seeking *all forms of relief* thereunder. App. 39a-46a. In addition to referencing the forum selection clause in Art. IV(e) cited above, the court noted that interstate compacts have traditionally been treated as federal law subject to federal judicial review.[8] App. 39a-41a. The court added that the Supreme Court's prohibition against *implying* state waivers of Eleventh Amendment sovereign immunity applies only to suits brought by *private parties*, not to suits by compact entities such as the Commission in the instant action. App. 44a-45a.

Nebraska appealed the denial of its motion to dismiss, exercising its right to immediate appellate review under *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993). The Eighth Circuit affirmed, offering no different analysis from that of the district court. Instead, it held that its earlier ruling in the preliminary injunction appeal regarding what it had characterized as Nebraska's Eleventh Amendment waiver of at least "a portion" of the State's sovereign immunity (*i.e.*, that portion pertaining only prospective relief) was *law of the case*, and applied equally to claims not only for prospective injunctive relief, but also for damages and other retrospective relief. App. 13a. The court of appeals concluded that, by delegating authority to the Commission to enforce signatory States' Compact obligations and to sue for breaches "in any court . . . that has jurisdiction," Art. IV(e), Nebraska waived its Eleventh Amendment sovereign immunity for all purposes and in all respects. App. 13a-14a.

Requests to stay the trial court proceedings pending final resolution of the sovereign immunity issue were made in both the trial and appellate courts, citing this Court's deci-

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[8] The two cases cited by the district court for this proposition raise no Eleventh Amendment issues. *See Cuyler v. Adams*, 449 U.S. 433 (1981) (non-Compact case); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518 (1852) (original action).

sions in *Metcalf & Eddy*, 506 U.S. at 145-47, and *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), as well as similar Eighth Circuit precedent. *See Ginter v. Stallcup*, 869 F.2d 384, 387 (8th Cir. 1989). These motions were denied, and an earlier request of this Court to intervene and stay discovery while the Eighth Circuit appeal remained pending, was likewise denied.[9]

REASONS FOR GRANTING THE WRIT

The Eighth Circuit's misuse of the law of the case doctrine as a short-hand excuse for rejecting Petitioner's sovereign immunity defense does serious violence to Eleventh Amendment jurisprudence that cannot go unaddressed by this Court. In holding that the State, by virtue of its entry into a multistate compact, waived its immunity from federal suits seeking damages and other forms of retrospective relief, the court of appeals broke sharply with settled legal precedent, *see Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-06 (1990); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 579-80 (1946), put itself on a collision course with other federal courts of appeals, *see Broughton Lumber Co. v. Columbia River George Comm'n*, 975 F.2d 616, 619-20 (9th Cir. 1992); *Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 39 (2d Cir. 1977), and chose to disregard the prospective-only nature of the carefully worded enforcement language that the signatory States agreed upon in the Compact.

This Court has admonished repeatedly that the Eleventh Amendment provides the States with a fundamental constitutional safeguard, insuring immunity from federal suits absent

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[9] Simultaneous with the filing of this certiorari petition, the State has renewed its stay request to this Court, asking that the discovery which has been allowed to commence in the district court be halted pending this Court's final disposition of the instant petition.

the most explicit and unequivocal waiver. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984). The Eighth Circuit's contrary ruling – applying a much less stringent waiver analysis to language in a multistate compact on the theory that participating States necessarily surrender a measure of their sovereignty upon entry into such an arrangement – conflicts with both decisions of this Court and the controlling law of other circuits, and thus cries out for Supreme Court intervention.

States are parties to numerous multistate compacts, all of which require congressional consent. The agreements embrace a wide variety of subjects, including water rights, environmental waste disposal, pollution control, and transportation. In fact, there are at least nine additional regional low-level radioactive waste compacts that are identical in all relevant respects to the Compact at issue here.[10] There is noth-

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[10] The following interstate compacts are codified in the statutes listed in the parentheticals: *Appalachian States Low-Level Radioactive Waste Compact* (Del. Code Ann. tit. 7 § 8001 (1991); Md. Code Ann., Envir. § 7-301 *et seq.* (1996); 35 Pa. Cons. Stat. Ann. § 7125.1 (West 1993); W. Va. Code Ann. § 29-1H-1 (Michie 1999)); *Central Midwest Interstate Low-Level Radioactive Waste Compact* (45 Ill. Comp. Stat. Ann. 140/1 (West 1993); Ky. Rev. Stat. Ann. § 211.859 (Banks-Baldwin 2000)); *Midwest Interstate Low-Level Radioactive Waste Compact* (Ind. Code Ann. § 13-29-1-1 *et seq.* (West 1998); Iowa Code Ann. § 457B.1 (West 1997); Mich. Comp. Laws Ann. § 3.751 (West 1994); Minn. Stat. Ann. § 116C.831 (West 1997); Mo. Ann. Stat. § 260.700 (West 2001); Ohio Rev. Code Ann. § 3747.01 (Anderson 1999); Wis. Stat. Ann. § 16.10 *et seq.* (West 1996)); *Northeast Interstate Low-Level Radioactive Waste Compact* (Conn. Gen. Stat. Ann. § 22a-161 (West 1995); N.J. Stat. Ann. § 32:31-1 *et seq.* (West 1990); S.C. Code Ann. § 48-46-70 (Law. Co-op. 2000 Supp.)); *Northwest Interstate Compact On Low-Level Radioactive Waste* (Alaska Stat. § 46.45.010 (Michie 2000); Haw. Rev. Stat. Ann. § 339K-1 (Michie 2000); Idaho Code § 39-3025 (Michie 1998); Mont. Code Ann. § 50-79-501 (1999); Or. Rev. Stat. § 469.930 (1992); Utah Code Ann. § 19-3-201 *et seq.* (1998); Wash. Rev. Code Ann. § 43.145.010 (West 1998); Wyo. Stat. Ann. § 9-6-206 (Michie 2001)); *Rocky Mountain Low-Level Radioactive Waste Compact* (Colo. Rev. Stat. Ann. § 24-60-2202 (West 2001); Nev. Rev. Stat. Ann. § 459.007 (West

(footnote continued on next page)

ing inherent in these essentially contractual arrangements between member States to suggest that the claims of Eleventh Amendment immunity by participants are entitled to any less respect than this Court has demanded in virtually all other contexts. The Eighth Circuit's utter disrespect for this principle requires plenary review by this Court.

I. SOVEREIGN IMMUNITY IS A CORE CONSTITUTIONAL PROTECTION DEMANDING STRICT ENFORCEMENT

It is now firmly established in the jurisprudence of this Court that, although the literal text of the Eleventh Amendment restricts only Article III diversity jurisdiction, the sovereign immunity of the States is neither derived from, nor limited to, the specific language therein. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996). The immunity of States from suit is "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Not only does this immunity confer upon States "the respect owed them as members of the federation," *Metcalf & Eddy*, 506 U.S. at 146, but it safeguards their "ability to govern in ac-

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2000); N.M. Stat. Ann. § 11-9A-2 (Michie 2000)); *Southeast Interstate Low-Level Radioactive Waste Management Compact* (Ala. Code § 22-32-1 (1997); Fla. Stat. Ann. § 404.30 (West 1998); Ga. Code Ann. § 12-8-120 *et seq.* (1996); Miss. Code Ann. § 57-47-1 (1999); Tenn. Code Ann. § 68-202-701 (1996); Va. Code Ann. § 10.1-1500 (Michie 1998)); *Southwestern Low-Level Radioactive Waste Disposal Compact* (Ariz. Rev. Stat. Ann. § 30-721 (West 1996); Cal. Health & Safety Code § 115250 *et seq.* (West 1996); N.D. Cent. Code § 23-20.5-01 (1991); S.D. Codified Laws § 34-21B-3 (Michie 1994)); *Texas Low-Level Radioactive Waste Disposal Compact* (Tex. Health & Safety Code Ann. § 403.001 *et seq.* (Vernon 2001); Vt. Stat. Ann. tit. 10, § 7069 (1998).

cordance with the will of their citizens." *Alden*, 527 U.S. at 751.

These most basic principles of federalism have been reaffirmed by this Court in a number of recent decisions, all clearly holding that a State may not be haled into federal court in the absence of either (i) a valid abrogation of its immunity by Congress, acting pursuant to section five of the Fourteenth Amendment, or (ii) an unequivocal waiver of immunity by the State itself. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). Because congressional consent to the Central Interstate Low-Level Radioactive Waste Compact was secured through an exercise of Congress' Article I powers (specifically, the Compact Clause, *see* U.S. Constit. art. I, § 10, cl. 3), abrogation is not at issue here. The lower court's finding of a "waiver," however, is definitively before the Court.

The Supreme Court has recognized that a State's sovereign immunity is "a personal privilege which it may waive at its pleasure." *Clark v. Barnard*, 108 U.S. 436, 447 (1883). But the test for determining whether a State has waived its sovereign immunity from federal suit is highly "stringent," *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), and no waiver will be recognized unless "stated by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quotation omitted) (alteration in original). Indeed, waiver language must be narrowly construed, and a court should "indulge every reasonable presumption against waiver." *College Sav. Bank*, 527 U.S. at 682. Constructive and implicit waivers are thus not recognized. *See id.* at 680 (overruling *Parden v. Terminal Ry.*, 377 U.S. 184 (1964)).

II. THE EIGHTH CIRCUIT'S HOLDING THAT NEBRASKA WAIVED ITS ELEVENTH AMENDMENT IMMUNITY CONFLICTS WITH SUPREME COURT AND OTHER FEDERAL APPELLATE PRECEDENT

In concluding that Nebraska waived its sovereign immunity in the multistate Compact at issue here, the Eighth Circuit departed from well-entrenched Supreme Court and federal appellate precedent regarding the degree of specificity necessary to constitute a valid waiver of Eleventh Amendment immunity. It did so on the apparent (and legally insupportable) assumption that, upon entry into an interstate compact, the presumption against a State's waiver of sovereign immunity is to be turned on its head, and language heretofore consistently regarded as insufficient for waiver purposes can be construed as sufficient against a Compact State.

Thus, the court of appeals found that the Compact language authorizing the Commission to initiate prospective-only actions against member States "to require [them] *to perform* their [Compact] duties and obligations," Art. V(e)(2) (emphasis added), in "*any court of law*, or any Federal, state or local agency, board or commission *that has jurisdiction* over any matter arising under or relating to" the Compact, Art. IV(e) (emphasis added), is to be read as a voluntary consent by member States to suit for *all forms* of relief in federal court, including damages and other forms of retrospective relief. App. 13a, 63a-64a. A careful reading of the Compact demonstrates that its language supports no such waiver. In such circumstances, the Eleventh Amendment permits no greater intrusion upon the sovereignty of a Compact State than would be constitutionally permissible for a State that is *not* a party to the Compact arrangement. The Eighth Circuit's understanding to the contrary, *i.e.*, that a Compact State essentially surrenders all claims to sovereign immunity simply by virtue of entering into the Compact, *see* App. 13a-14a

& 63a-64a, is directly at odds with other federal courts. *See, e.g., Broughton Lumber Co.*, 975 F.2d at 619-20; *Trotman*, 557 F.2d at 39; *Oley Township v. Delaware River Basin Comm'n*, 906 F. Supp. 284, 287 (E.D. Pa. 1995).[11]

Here, it is undisputed that the Commission's authority to proceed against member States is captured in two provisions in the Compact. Article IV(m)(8) allows the Commission to initiate proceedings or appear as an intervenor in "an appropriate action in any forum designated in [Article IV(e)]" for the purpose of "requir[ing] all party states *to perform* their [Compact] duties and obligations." (emphasis added). Article V(e)(2) directs the Commission to require the Host State (*i.e.*, Nebraska) "*to process* all applications for permits and licenses required for the development and operation of any regional facility *within a reasonable period from the time that a completed application is submitted*." (emphasis added). Both clauses undeniably operate on an exclusively *prospective* basis. Neither empowers the Commission to sue a member State *for damages or other retrospective relief* to redress alleged malfeasance occurring in the past.

Yet, the Commission's lawsuit here is of a *retrospective nature only*, seeking redress for what is alleged throughout as

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[11] The reference to *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), in this Court's *College Savings Bank* decision reinforces the principle that the existence and scope of a sovereign immunity waiver in an interstate compact turns on the *specific language in the compact*, not on the mere fact of a State's compact participation. *See College Sav. Bank*, 527 U.S. at 686 (*Petty* "held that a bistate commission which had been created pursuant to an interstate compact . . . *had consented to suit by reason of a suability provision attached to the congressional approval of the compact.*") (emphasis added); *see also Petty*, 359 U.S. at 277 (suability provision stated that "nothing herein contained shall be construed to affect, impair, or diminish any right, power, or jurisdiction of . . . *any court . . . of the United States*") (emphasis added).

past misconduct.[12] The complaint focuses entirely on historical actions by Nebraska officials in the review of USE's license application, a proceeding which concluded in December 1998 with the issuance of a formal denial by the State's reviewing agencies. For relief, the Commission seeks an accounting of past licensing expenditures and more than $80 million dollars in damages. Nowhere in the Compact does the State waive its Eleventh Amendment immunity from such claims.[13]

Rather, as previously indicated, the Compact authorizes the Commission to proceed in court against a party State only *prospectively* for the purpose of requiring it "to perform" its Compact duties and obligations, Art. IV(m)(8), and, more particularly as to the Host State, "to process" the facility license application in a timely manner, Art. V(e)(2). The Compact further provides that "each party state has the right to rely on the good faith performance of each other party

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[12] Although the Commission sought below to characterize part of its plea for relief as prospective in nature, the complaint will not permit such a characterization. Nowhere does the Commission seek an order directing the State to perform Compact duties or to diligently process license applications. To the contrary, the Commission's pleadings request an order *completely removing* the State from the license review process, and ask that the federal court transfer the licensing process elsewhere, preferably to a court-appointed master. In short, the proposed injunctive relief is aimed, not at securing future compliance with the Compact, but at foreclosing the State from ever performing its licensing duties based solely on purported past misconduct by various State officials. Nowhere did Nebraska consent to such relief by a federal court.

[13] Notably, the Commission's claims – asserted against Nebraska following Commission realignment from a named defendant to a plaintiff in the underlying lawsuit commenced by the Utilities – parrot those of the Utilities, including the requested retrospective relief. The Eighth Circuit agreed that the Compact contains no waiver of sovereign immunity as to the federal suit of the Utilities. App. 15a-18a. Logic, therefore, demands that the Compact similarly contain no waiver permitting the Commission to pursue the identical claims and identical relief on the Utilities' behalf.

state." Art. III(f) (Add. 28). It is questionable whether such language can even be said to implicate the Eleventh Amendment, since it is directed only at *prospective* lawsuits[14] that can properly be brought against State officials in federal court under the *Ex parte Young* exception to the Eleventh Amendment.[15] In any event, these provisions certainly carry no suggestion of consent to federal suits that are entirely of a retrospective nature.

Indeed, to the extent the Compact contemplates *any* form of retrospective Commission action against a party State, it explicitly dictates that such proceedings are to be taken administratively, not in court. Thus, the Compact provides in the most unambiguous terms that when a member

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[14] While the Commission professes to rely on this "good faith performance" language to support its retrospective lawsuit, its claims (on realignment) for damages and removal of the State from the licensing process are no different from the claims of the Utilities who first brought the suit. The Eighth Circuit properly found that the Utilities have no right of action under the "good faith performance" clause of the Compact, either directly or as incidental beneficiaries. App. 15a-18a. So, too, the Commission, in a federal suit on the Utilities' behalf, can no more invoke the "good faith performance" provision in an attempt to obtain a refund of monies the Utilities spent in the licensing process, than could the Utilities themselves. Moreover, while this provision of the Compact would appear to contemplate that any "party state" could pursue any other "party state" for a failure of "good faith performance," such a suit would necessarily have to be brought as an original action in this Court under Article III, Section 2, Clause 2 of the Constitution, and not, as here, in a lower federal court.

[15] While this *prospective only* language could perhaps be construed as a limited waiver of immunity to the extent it provides for a Commission suit against a *party State*, rather than *State officials*, *see Pennhurst*, 465 U.S. at 114 n.25 (discussing *Ex parte Young*'s fictional distinction between State officials and the State itself), the Commission recently amended its complaint to include both the State and State officials, thereby availing itself of the *Ex parte Young* exception in enforcing Compact obligations prospectively.

State "ha[s] arbitrarily or capriciously denied or delayed the issuance of a license or permit," Art. V(g), or has "fail[ed] to comply with the terms of this compact or fulfill its obligations [t]hereunder," Art. VII(e), suspension of Compact privileges and/or revocation of Compact membership are the available remedies the Commission, after notice and hearing, can appropriately pursue.

While the Eighth Circuit dismissed these Compact provisions because they nowhere stated that such administrative remedies are "exclusive," App. 63a-64a, the more telling observation for Eleventh Amendment purposes is that nowhere does the Compact state that they are *not* exclusive. This Court has repeatedly emphasized that a waiver of sovereign immunity from retrospective lawsuits is not to be inferred from the unstated, but can *only* be discerned from that which is explicitly stated. *See Edelman*, 415 U.S. at 673. Nor is the constitutional safeguard against inadvertent and unintended waivers of immunity any less protective for States that are members of multistate compacts than for States in other circumstances. Here, the Compact says *nothing whatsoever* about a waiver of sovereignty as to federal suits by the Commission seeking damages and retrospective relief.[16]

The Eighth Circuit nonetheless construed the venue provision contained in Article IV(e) of the Compact as signaling Nebraska's consent to federal suit for retrospective relief. Displaying a seeming indifference to the confining language of Articles IV(m)(8) and V(e)(2) discussed above, the court of appeals focused solely on Article IV(e)'s "in any court . . . that has jurisdiction" clause to find a waiver. That phraseology, whether read in isolation or in context, creates no enforceable Eleventh Amendment waiver. The Eighth

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[16] There is, of course, a *state court* appeal from final agency action that results in a denial of a waste facility license application. That appeal must be *de novo* on the full administrative record, Neb. Rev. Stat. § 84-917(5) (2000), and can include the Commission as an intervenor.

Circuit's decision to the contrary is in direct and irreconcilable conflict with established precedent of this Court and other federal appellate courts, all of which have refused to extrapolate a waiver of sovereign immunity from federal suits on virtually identical language.

There is, for example, the consistent refrain from this Court that a State does not waive its immunity from suit in federal court simply by authorizing suit against it in "any court of competent jurisdiction." *See College Sav. Bank*, 527 U.S. at 676 (citing *Kennecott Copper*, 327 U.S. at 577-79); *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 287 (1973); *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 465 (1945). Such authorization "fall[s] short of the clear declaration by a State of its consent to be sued *in the federal courts* which . . . is required before federal courts should undertake adjudication of the claims . . . against a State." *Kennecott Copper*, 327 U.S. at 579-80 (emphasis added); *cf. Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 75 (2000) (federal statute providing for suit "'in any *Federal or State court* of competent jurisdiction' . . . eliminates the ambiguity identified in *Kennecott Copper* – whether Utah intended to permit suits against the sovereign in state court only, or in state and federal court.") (emphasis added).[17]

The fact that the operative phrase is found in an interstate compact does not alter the waiver analysis. This Court

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[17] Nor is the Eighth Circuit's suggestion correct that *Texas v. New Mexico*, 482 U.S. 124, 128 (1987), supports a finding of sovereign immunity waiver by Nebraska as to the Commission's claims for money damages and other retrospective relief. That case was an *original action* filed directly in the Supreme Court and thus in no way implicated the Eleventh Amendment. *See id.* at 130 ("In proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State."); *accord Kansas v. Colorado*, 121 S. Ct. 2023, 2027 (2001).

effectively so held in *Feeney*, 495 U.S. at 306, finding that the waiver provision in an interstate compact in which signatory States "consent[ed] to suits, actions, or proceedings of any form or nature at law, in equity or otherwise" was insufficient to subject the States to suit in federal court. The Court there reiterated that, whatever the context, a State waiver of Eleventh Amendment immunity will be recognized only where articulated with unequivocal clarity. *Id.* at 305. Thus, a valid waiver "must specify the State's intention to subject itself to suit in *federal court*." *Id.* at 306 (emphasis in original) (citation omitted). The cited provision failed to do this, and it, therefore, was held to be inadequate, standing alone, to deprive the State of its sovereign immunity from federal lawsuits. *Id.*[18]

Other federal appellate courts have reached the same conclusion and are diametrically at odds with the Eighth Circuit's ruling here. In *Mueller v. Thompson*, 133 F.3d 1063, 1064-65 (1998), for example, the Seventh Circuit reasoned that a Wisconsin statute sanctioning actions against the State for uncompensated overtime pay "in any court of competent jurisdiction" could not be properly characterized as a waiver of the State's *federal court* immunity. Although recognizing that "[n]o magic words are required," *id.* at 1064, the Seventh Circuit held that the quoted language was, at most, an *implicit* waiver, and its drafters were "unlikely to have had federal courts in mind when they said 'any court of competent jurisdiction.'" *Id.* at 1065. The Ninth Circuit reached the same result in *Riggle v. California*, 577 F.2d 579, 585-86 & n.8 (1978), holding that the venue provision in California's

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[18] The Court in *Feeney* found that the compact did, in that instance, include adequate waiver language in another textual provision declaring that the States' consent to suit "is granted on the condition that venue . . . shall be laid within a county or judicial district, established by one of said States *or by the United States*." 495 U.S. at 307 (emphasis added). The Compact at issue here is decidedly different and contains nothing similar to the italicized language in the *Feeney* compact.

Tort Claims Act, which waives the State's sovereign immunity for claims brought in "a court of competent jurisdiction," encompasses only state courts. *Cf. Daigle v. Gulf State Utils. Co.*, 794 F.2d 974, 980 & n.7 (5th Cir. 1986) (holding that a Texas statute permitting aggrieved parties to sue the State in "any court of competent jurisdiction in the county of [plaintiff's] residence" did not waive the State's sovereign immunity in federal court).[19]

There is no material difference between the purported waiver provision in Article IV(e) of the present Compact, and the clauses held to be deficient in the cases cited above. Here, as there, no mention is made of *federal courts*. Indeed, the word "Federal" was explicitly included in Article IV(e) as a modifier of "agency, board or Commission," *but not* as a modifier of "any court of law." Moreover, elsewhere in the Compact – at Article IV(l) – "the United States District Court" is expressly identified as the proper forum for suits *against the Commission* by persons or party states aggrieved by Commission decisions. It is a well settled doctrine of statutory construction that where there is language included

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[19] The only federal court of appeals decision even tangentially supporting the Eighth Circuit's holding is *Telespectrum, Inc. v. Public Serv. Comm'n*, 227 F.3d 414 (6th Cir. 2000). There, a cellular telephone service provider sued the Kentucky Public Service Commission and various Commission officials in federal court following the denial of its application to construct a communications tower. Although the plaintiff sought only an order of injunctive relief pursuant to *Ex parte Young*, the State defendants asserted an Eleventh Amendment sovereign immunity defense, insisting that jurisdiction lay only in state court by virtue of a Federal Communications Act provision declaring that enforcement actions of the type at issue must be commenced in a "court of competent jurisdiction." *Telespectrum*, 227 F.3d at 421. Relying on *Adams v. Maryland*, 347 U.S. 179 (1954), an evidentiary privilege case having nothing whatsoever to do with the Eleventh Amendment, the Sixth Circuit opined in dicta that the quoted language could be read to encompass both state and federal courts. *Telespectrum*, 227 F.3d at 421. The court nonetheless ultimately upheld federal jurisdiction over the State defendants under *Ex parte Young*.

in one section of a statute which is omitted in another section of the same statute, the disparate inclusion and exclusion are presumed to have been done intentionally and purposely. *See Bates v. United States*, 522 U.S. 23, 29-30 (1997).

Both Congress and the Compact's signatory States undoubtedly knew how to draft an Eleventh Amendment waiver provision; they clearly chose not do so in Article IV(e).[20] Nor does language elsewhere in the Compact, authorizing the Commission to pursue the States and State officials prospectively, *see* Arts. IV(m)(8) and V(e)(2), alter this conclusion or otherwise subject Nebraska to a federal suit seeking money damages and other forms of retrospective relief for alleged past misconduct.

The Eighth Circuit's misplaced reliance on the *law of the case* doctrine to fashion a Compact waiver to retrospective relief from its earlier affirmation of the district court's prospective preliminary injunction order, provides no justification for its decision. Precisely because Eleventh Amendment waivers must be explicit and unequivocal, a State's consent to be subject to prospective relief of the sort embraced under the *Ex parte Young* exception to the Eleventh Amendment cannot be expanded, by implication or otherwise, into a much broader consent to federal suits for money damages and other retrospective relief. Nor can this principle have any less application to Compact States by virtue of their having joined a multistate compact than to other non-member

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[20] In fact, Congress seemingly recognized that federal court actions for money damages would not be cognizable against signatory States. In its legislation consenting to the Compact here, Congress specifically stated that nothing in the Low-Level Radioactive Waste Policy Act or the Compact may be construed to "to alter, amend, or otherwise affect any Federal law governing the judicial review of any action taken pursuant to [the] compact." 42 U.S.C. § 2021d(b)(4). The Eleventh Amendment, of course, is such a "federal law." Its sovereign immunity protections guarding the several States against federal suits seeking retrospective relief, including money damages, thus remain unaltered and unaffected.

States. *See Trotman*, 557 F.2d at 39-40 (State cannot be deemed to have waived its Eleventh Amendment immunity "simply because Congress has approved the compact" in which the State is participating). Even accepting for present purposes the Eighth Circuit's initial ruling that the State here waived at least "a portion" of its sovereignty for purposes of prospective preliminary injunctive relief, App. 65a, the remaining "portion" not explicitly waived cannot be said to have been lost by implication upon consent to the Compact.[21]

State sovereignty is no trivial matter. To the extent consent is given by any State participant in an interstate compact agreement to be sued prospectively "in any court . . . that has jurisdiction," it is critically important that the compact be narrowly construed for Eleventh Amendment purposes, not read expansively. *See College Sav. Bank*, 527 U.S. at 682 (federal court must "indulge every reasonable presumption against" State's waiver of Eleventh Amendment rights); *accord Feeney*, 495 U.S. at 305. There are a large number of multistate compact agreements, nearly all of which confer authority on some neutral body to enforce the compact prospectively in court.[22] The Eighth Circuit's ruling places the

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[21] In its initial preliminary injunction ruling, the Eighth Circuit considered the Commission's stated concern over having to expend additional funds during the appeal process as indicative of irreparable injury, noting explicitly that "[r]elief in the form of money damages could well be barred by Nebraska's sovereign immunity." App. 68a. The district court also saw the issue of prospective relief as raising a different sovereign immunity issue than the one raised in a suit for money damages. 46 F. Supp. 2d at 992-93. Yet, any such distinction between prospective and retrospective relief was mysteriously swept aside with the appellate court's misapplication of the law of the case doctrine. App. 13a.

[22] *See* note 10, *supra*, surveying interstate compact agreements involving low-level radioactive waste disposal that track the relevant Compact language at issue here. In addition, the following statutes codify interstate compact provisions in other contexts in which States are exposed to suit in "courts of competent jurisdiction:" Ala. Code §§ 33-18-1, 33-19-1 (1997); Cal. Gov't Code § 66801 (West Supp. 1997); Cal. Water

(*footnote continued on next page*)

Eleventh Amendment sovereignty of the participants to such arrangements at risk simply by virtue of their compact participation.

This Court and other federal appeals courts have made it clear in other contexts that States cannot be deemed to have waived their immunity from suit without explicitly consenting to be sued in federal court for money damages or other retrospective relief. The present circumstances of the State of Nebraska as a member of an interstate compact arrangement offers no justification for departing from that constitutional imperative. Plenary review by the Supreme Court is needed to correct an Eighth Circuit ruling that undermines the strong sovereign immunity decisions of this Court in recent years, and promises to compromise the Eleventh Amendment protections that are such a fundamental component of State sovereignty.

Code §§ 5901, 5976 (West 1971); Conn. Gen. Stat. Ann. §§ 22a-166, 22a-309 (West 1995); Del. Code Ann. tit. 7, § 6501 (1991); Fla. Stat. Ann. § 373.71 (West 1995); Ga. Code Ann. § 12-10-110 (Supp. 2000); Mo. Ann. Stat. § 643.600 (2000); Nev. Rev. Stat. Ann. §§ 277.200, 538.600 (Michie 1997 & 1995); N.J. Stat. Ann. § 32:11D-1 *et seq.* (West 1990); N.Y. Envtl. Conserv. Law §§ 21-0701, -1301, -1501 (McKinney 1997); Or. Rev. Stat. § 542.620 (1988); 32 Pa. Cons. Stat. Ann. § 820.1 (West 1997).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JULY 2001

APPENDIX

Entergy, Arkansas, Inc., an Arkansas corporation; Entergy Gulf States, Inc., a Texas corporation; Entergy Louisiana, Inc., a Louisiana corporation; Wolf Creek Nuclear Operating Corporation, a Delaware corporation; Omaha Public Power District, a public corporation and political subdivision of the state of Nebraska, *Plaintiffs*,

Central Interstate Low-Level Radioactive Waste Compact Commission, *Plaintiff-Appellee*,

US Ecology, Inc., a California corporation, Intervenor

v.

State of Nebraska, *Defendant-Appellant*.

Department of Environmental Quality, Nebraska; Randolph Wood, individually and in his official capacity; Jay Ringenberg, individually and in his official capacity; Nebraska Department of Health and Human Services Regulation & Licensure; David P. Schor, individually and in his official capacity; Cheryl Rogers, individually and in her official capacity; and John Doe, Jane Doe; Doe Companies 1 through 20, individually and in their official capacities, *Defendants*.

Entergy, Arkansas, Inc., an Arkansas corporation; Entergy Gulf States, Inc., a Texas corporation; Entergy Louisiana, Inc., a Louisiana corporation; Wolf Creek Nuclear Operating Corporation, a Delaware corporation; Omaha Public Power District, a public corporation and political subdivision of the state of Nebraska, *Plaintiffs-Appellees*,

Central Interstate Low-Level Radioactive Waste Compact Commission, *Plaintiff*,

US Ecology, Inc., a California corporation, *Intervenor-Appellee*,

v.

State of Nebraska; Department of Environmental Quality, Nebraska; Randolph Wood, individually and in his official capacity; Jay Ringenberg, individually and in his official capacity; Nebraska Department of Health and Human Services Regulation & Licensure; David P. Schor, individually and in his official capacity; Cheryl Rogers, individually and in her official capacity, *Defendants-Appellants*,

John Doe; Jane Doe; Doe Companies 1 through 20, individually and in their official capacities, *Defendants*.

Nos. 99-4263, 99-4265

United States Court of Appeals, Eighth Circuit

Submitted: October 16, 2000
Filed: March 8, 2001

Appeals from the United States District Court for the District of Nebraska (Kopf, Chief District Judge)

Before WOLLMAN, Chief Judge, MORRIS SHEPPARD ARNOLD and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

This case arises out of the five state Central Interstate Low-Level Radioactive Waste Compact (the Compact) and was last before the court on Nebraska's appeal from a preliminary injunction in favor of the Central Interstate Low-Level Radioactive Waste Commission (the Commission).

See Entergy, Arkansas, Inc. v. Nebraska, 210 F.3d 887 (8th Cir. 2000) (affirming the district court). Now the Nebraska parties bring two interlocutory appeals from the district court's denial of motions seeking Eleventh Amendment and qualified immunity and the dismissal of claims brought by the Commission, some nuclear waste generators, and US Ecology (USE), an applicant for a license to build a disposal facility in Nebraska. We affirm in part, reverse in part, and remand.

I.

The background of the Compact has been described in previous decisions of this court. *See id.* at 890-95; *Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n*, 187 F.3d 982 (8th Cir. 1999); *Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n*, 26 F.3d 77 (8th Cir. 1994). Under authority of the Low-Level Radioactive Waste Policy Act of 1980 (the Act) passed by Congress, 42 U.S.C. § 2021b et seq. (1994), Nebraska, Arkansas, Kansas, Louisiana and Oklahoma entered into the Compact. Nebraska, the other four states, and Congress all enacted the Compact as original legislation. *See* Neb.Rev.Stat. § 71-3521 (1996 Reissue) repealed by Neb.Rev.Stat. § 71-3522 (effective August 28, 1999) and Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub.L. 99-240, tit. II, sec. 222, 99 Stat. 1859, 1863 (1986) (reprinting the Compact which is cited in this opinion by article). The Compact created a framework for the development of low-level radioactive waste facilities and established the Commission as the governing body. *See* Art. IV. Several provisions address each state's obligations under the Compact. The Compact provides that each state has "the right to rely on the good faith performance of each other party state." Art. III(f). The state selected to host a disposal facility is required "to process all applications for permits and licenses required for the devel-

opment and operation of any regional facility or facilities within a reasonable period from the time that a completed application is submitted." Art. V(e)(2). The Commission is authorized to "[r]equire all party states ... to perform their duties and obligations arising under this compact." Art. IV(m)(8).

In December 1987, the Commission chose Nebraska as the first member state to host a waste disposal facility. The Commission contracted with USE to file a license application for a disposal facility and then to build and maintain it. Under Nebraska law USE was required to pay all costs associated with licensing, but pursuant to a separate agreement the costs were to be reimbursed at a later date by the Commission. *See* Neb.Rev.Stat. § 81-1579(2) (1999 Reissue). The Commission entered into agreements with Entergy, Arkansas, Inc., Entergy Gulf State, Inc., Entergy Louisiana, Inc., Wolf Creek Nuclear Operating Corp., and Omaha Public Power District (the Generators) to pass on the cost of the licensing to them. At the time the preliminary injunction was issued in April of 1999, the licensing process had already cost more than $80 million. These costs included monies paid by Nebraska for subcontractors and consultants, direct labor, office and administrative expenses, and other costs associated with the review of the license application. The Generators paid $74 million of the total costs to the Commission which turned over the funds to USE. USE itself contributed the remaining $6 million for preliminary costs connected to the license application, costs for which it has not been reimbursed.

When Nebraska was chosen to provide the first site, Governor Kay Orr publicly stated that the state was not happy to be the host for the disposal facility but that it would honor its commitment under the Compact. In July 1990, USE submitted its license application to the Low-Level Ra-

dioactive Waste Program operated by two Nebraska state agencies responsible for licensing waste facilities. Those Nebraska agencies are the Department of Environmental Quality (EQ) and the Department of Health and Human Services and Licensure (HHS), both parties in this action. The two agencies required USE to answer some 700 questions before they would review its application. E. Benjamin Nelson, a candidate for governor of Nebraska, promised that if he were elected "it is not likely that there will be a nuclear dump [] in Nebraska." *Entergy, Arkansas, Inc. v. Nebraska*, 46 F.Supp.2d 977, 981 (D.Neb. 1999). Nelson won election, and Randolph Wood became the director of EQ. From that time the state no longer exchanged information with USE. In December 1991, EQ stated that it would not accept any responses to its 700 questions until all of the answers were completed and submitted together; this added to the delay and the cost. In July 1992, the Nebraska Auditor of Public Accounts, found that the EQ had not adopted a budget to control the cost of review or a timetable to complete the work, and it recommended that the EQ do so, but Wood refused. After USE submitted its answers, EQ issued a Notice of Intent to Deny the license in January 1993, due to drainage problems and "wetlands on the site." Appellee's App. II, 387. USE responded by opening a contested case administrative proceeding under Nebraska law to challenge that decision. It later amended its application and withdrew its pending case after reaching a settlement with Nebraska.

After the first contested case was withdrawn, the review process continued with more questions and technical review of the amended application. During this process, Nebraska demanded that the Commission turn over to it federal rebate money received under the Act from the United States Department of Energy (DOE). When the Commission did not turn over the rebate money, EQ directed the contractors doing the state's technical review to cut back their work and

billings by twenty-five percent. Nebraska sued the Commission to recover federal rebate funds, and it received part of the money after it promised to accelerate review, but the amount of review work continued to decline after the settlement.

USE's application to build the disposal facility was deemed complete by Nebraska in June 1995, and EQ and HHS then said that their review of the application would take about one more year to complete. EQ later notified USE that the review would take longer because two technical documents would not be finished until October 1997. When EQ issued these two documents, it stated that the facility met site suitability requirements, but the review continued nevertheless. The Commission then imposed a deadline of January 14, 1997 for Nebraska to complete its review of USE's application, and Nebraska sued to have the deadline voided. This court upheld the district court ruling that the Commission had the power under the Compact to set the deadline. *See Central Interstate Low-Level Radioactive Waste Comm'n*, 187 F.3d at 987.

USE's amended license application was finally denied in December 1998 (the original application had been submitted in July 1990). The reasons stated for the denial were that there was insufficient depth of the water table at the site, that under the applicable regulations EQ could not consider engineered improvements to the site, and that USE had not shown financial ability to build and run the facility. On January 15, 1999, USE appealed the denial by filing another contested case petition with EQ, thus initiating a second administrative contested case proceeding under Nebraska law.

After USE opened its second contested case proceeding, the Generators filed this action and USE intervened, also as a plaintiff. These parties were frustrated by the delays in

the Nebraska process and the soaring costs which had caused them to spend over $80 million on the licensing proceedings by the time of the preliminary injunction in April 1999. They alleged that Nebraska, EQ, HHS, and individual state officials (collectively Nebraska) had violated the good faith provision in the Compact and their constitutionally protected rights to procedural and substantive due process. They brought their constitutional claims under 42 U.S.C. § 1983. USE also alleged that the Nebraska defendants had engaged in tortious interference and conspiracy under state tort law. The plaintiffs sought damages, injunctive and declaratory relief, removal of the state officials from the licensing procedure, an accounting, and attorney fees. They also asserted equitable subrogation claims against the Commission, but the district court realigned the Commission as another plaintiff in the case. The Commission brought crossclaims against the state of Nebraska for violating the Compact, seeking declaratory and injunctive relief, damages, an accounting, removal of the state from the licensing process and substitution of a neutral third party, and attorney fees.

In support of their claims, the plaintiffs set out detailed factual allegations alleging that Nebraska and its officials had deliberately delayed review of the license for eight years and intended that the process end in denial of the application. They alleged that Nebraska had threatened to begin administrative proceedings anew unless the first application were amended. After USE amended the application and withdrew its first contested case, Nebraska nonetheless treated the amended application as a new one, leading to increased costs and delay. They also alleged that Nebraska breached a settlement it had reached with them over federal rebate funds. Nebraska had agreed that in exchange for part of the rebate funds it would accelerate the pace of review and drop its suit, but after it settled the case and received the funds, it slowed the review process by reducing the work of outside techni-

cians it employed. They alleged that Nebraska had delayed and interfered in the review process by refusing to adopt a reasonable budget or schedule, by making unjustified and incorrect statements regarding the timing of the review with knowledge that the statements would be relied upon, by assisting and encouraging opponents of the disposal site to file suits and delay proceedings, by publicly disparaging the selected site, and by intervening in interstaff discussions. The plaintiffs also alleged that Nebraska and officials at EQ and HHS had improperly denied the amended application by relying on data which USE had furnished with the assurance that Nebraska would not use it in making its decision and by basing their denial on drainage plans in the original application to which they had not raised any objection. The plaintiffs further alleged that unauthorized HHS officials had provided statutory interpretations and participated in the license review. Finally, they alleged that the ongoing contested case proceeding in Nebraska was not a forum that would address their complaints that political influence and bad faith had tainted the license review process. Nebraska responded by raising its sovereign immunity and arguing that the claims are barred by qualified immunity and the Eleventh Amendment and that the allegations do not state a violation of the Compact or of the due process clause.

While the second contested case was continuing in Nebraska, the parties brought several motions in this case. The Nebraska parties brought two motions to dismiss, arguing that the district court lacked subject matter jurisdiction over the case and that the Commission, the Generators, and USE had failed to state claims upon which relief could be granted. The Commission and the Generators moved for a preliminary injunction to enjoin the ongoing second contested case proceeding in Nebraska.

Before ruling on Nebraska's motions to dismiss, the district court granted the Commission's motion for a preliminary injunction staying USE's administrative contested case proceeding. *See Entergy, Nebraska, Inc.*, 46 F.Supp.2d at 996. The district court held that the Commission would suffer irreparable injury if the proceeding were not enjoined because of the "stunted procedural" nature of the administrative proceeding. *See id.* at 993-94. The court also found that the Commission was likely to prevail on its claim that Nebraska had acted in bad faith because of Governor Nelson's campaign promises to block the nuclear disposal facility, the refusal of state officials to adopt a budget and review schedule, denial of the 1993 application because of wetlands on the site after outside counsel had advised that there was no problem in respect to wetlands, a work slowdown after the rebate fund settlement providing for accelerated review, and other detailed findings of bad faith. *See id.* at 994. The court also held that Nebraska had waived its Eleventh Amendment immunity from the Commission's suit for prospective relief. *See id.* at 995. Based on these findings, the court issued a preliminary injunction in April 1999. *See id.* at 996.

The district court later issued two separate opinions on Nebraska's motions to dismiss. In the first, the district court dealt with the Commission's claims against the state of Nebraska. *See Entergy, Arkansas, Inc. v. Nebraska*, 68 F.Supp.2d 1093 (D.Neb. 1999). The court held that Nebraska had waived its Eleventh Amendment immunity from these claims when it entered into the Compact. *See id.* at 1100. In reaching that decision the court considered the specific provisions of the Compact and the Commission's status under it as the enforcement agency. *See id.* at 1095, 1099. It also analyzed pertinent case law, the role of Congress, and historical legal relationships. *See id.* at 1097-99. It concluded that the Eleventh Amendment does not bar actions by the Commission to enforce the Compact, *see id.* at 1095-

1101, and that Nebraska had expressly consented to th Commission's suit for damages in federal court by agreein to Article III(f) and Article V(e)(2) of the Compact. *See i* at 1100-3. The court denied Nebraska's motion to dismi for failure to state a claim without discussion. *See id.* 1104.

In the second opinion, the district court dealt with th claims of the Generators and USE against the state of N braska, EQ, HHS, and the individual state officers. *See E tergy, Arkansas, Inc. v. Nebraska*, 68 F.Supp.2d 1104, 110 (D.Neb. 1999). The court rejected the state officials' defens of qualified immunity. *See id.* at 1108. It observed that th complaints alleged violations of the good faith requirement i the Compact and that the Compact was clearly establishe federal law of which a reasonable state official would hav been aware. *See id.* The court concluded that the Generato and USE had a right to sue under the Compact, as intende beneficiaries, to challenge acts which had "delayed, impede and prejudiced the license application" in violation of th Compact's good faith mandate. *Id.* The court conclude however, that Nebraska and officials in their official capaci had Eleventh Amendment immunity on the claims of th Generators and USE for anything beyond injunctive and d claratory relief. *See id.* at 1110. Nebraska's motion to di miss was otherwise denied. *See id.*

Nebraska filed an interlocutory appeal from decisio in each of the opinions by the district court. Before i briefing on these matters was complete, we issued our dec sion on the appeal from the preliminary injunction. *See E tergy, Arkansas, Inc.*, 210 F.3d at 901. Based on the natu of the Compact and the language of Article IV(e), we hel "that by entering into the Compact, Nebraska waived i [Eleventh Amendment] immunity from suit in federal cou by the Commission to enforce its contractual obligations

Id. at 897. As a result of this waiver, the Commission could enforce the good faith requirement on Nebraska, but we did not limit the Commission to only prospective relief. *See id.* We also found that the Commission's enforcement power was not limited to ousting the state from the Compact. *See id.* In addition to holding that Nebraska had waived its Eleventh Amendment immunity, we pointed out that the district court would also have jurisdiction "to enjoin the state officers under *Ex parte Young*" and that the Commission had shown ongoing violations of federal law. *Id.* at 898. We affirmed the issuance of the preliminary injunction. *See id.* at 901.

In the meantime briefs were completed on these interlocutory appeals. On its appeal from the district court's decision dealing with the Commission's claims, the state of Nebraska continues to assert Eleventh Amendment immunity. It also seeks to include in its interlocutory appeal issues related to the district court's denial of its motion to dismiss for failure to state a claim upon which relief can be granted. The Commission responds that Nebraska waived its sovereign immunity by entering into the Compact, that this court does not have interlocutory jurisdiction to determine whether the Commission has stated a claim, but that if the court reaches the issue, a claim has been stated.

In its appeal from the decision dealing with the claims of the Generators and USE, Nebraska argues that those claims are barred by the Eleventh Amendment and qualified immunity and that the plaintiffs have failed to state a claim upon which relief can be granted.[1] The Generators and USE

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[1] Nebraska claims for the first time on appeal that plaintiff Omaha Public Power District (OPPD) cannot assert due process claims because OPPD is a political subdivision of the state. OPPD argues that this is incorrect because it is substantially independent. We decline to reach this issue not raised in the district court. *See United States v. Nelson*, 109 F.3d 1323, 1325 (8th Cir. 1997).

respond that qualified immunity is not available to the officials in their individual capacities because clearly established federal law was violated, that the Eleventh Amendment does not bar prospective relief against state officials, and that this court does not have jurisdiction to determine whether claims were stated, but that they were in any event.

The parties disagree on the extent of the issues properly before the court on these interlocutory appeals. They agree that rulings on immunity are reviewable de novo. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993); *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985). They disagree on whether this court can now consider issues raised by the denial of the motions for failure to state a claim. Appellate review is generally only available after final judgment, but there are exceptions, such as the one for immunity issues and another for issues "inextricably intertwined" with those appealable at the interlocutory stage. *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51 (1995), *see United States v. Brakke*, 813 F.2d 912, 913 (8th Cir. 1987) (denial of a motion to dismiss for failure to state a claim is not a final appealable order). An issue is "inextricably intertwined" with properly presented issues "'only if it is coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral appeal necessarily resolves the pendent claims as well.'" *Kincade v. City of Blue Springs, Mo.*, 64 F.3d 389, 394 (8th Cir. 1995), *quoting Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995).

II.

Nebraska argues that the district court erred when it denied its motion to dismiss the Commission's claims. It says the Commission's claims are barred by the Eleventh Amendment because it did not waive its immunity by enter-

ing into the Compact. Even if it did waive its immunity, the waiver was only from suits by party states and the Commission is not a party to the Compact. Finally, Nebraska contends that the Commission failed to state a claim upon which relief can be granted under the Compact.

Nebraska argues in its briefing that the Commission's claims are barred by the Eleventh Amendment, but we have already held "that by entering into the Compact, Nebraska waived its immunity from suit in federal court by the Commission to enforce its contractual obligations." *Entergy, Arkansas, Inc.*, 210 F.3d at 897. "It has long been recognized that a state may waive its Eleventh Amendment immunity." *See id.* at 896. A waiver of immunity occurs when a state makes a "clear declaration" of its intention to submit to suit in federal court as evidenced by the language of the text or an "overwhelming implication from the text as [will] leave no room for any other reasonable construction." *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (internal quotation and citation omitted). Although our review of the district court's decision to grant an injunction was under an abuse of discretion standard, we reviewed de novo its legal conclusion that Nebraska had waived its Eleventh Amendment immunity. *See Entergy, Arkansas Inc.*, 210 F.3d at 897. We carefully considered the Eleventh Amendment issue before deciding it in the course of the preliminary injunction appeal, and our holding that Nebraska waived its immunity from claims by the Commission, including claims for damages, is now the law of the case. *See In re Progressive Farmers Assoc.*, 829 F.2d 651, 655 (8th Cir. 1987).

Nebraska argues that the Commission is not a party to the Compact and so it may only seek future performance, not damages or an accounting for past breaches. In the Compact which Nebraska entered, the party states chose to delegate authority to the Commission to initiate "any proceedings

... before any court of law," which includes suits for breach of the Compact. Art. IV(e). The states not only allowed the Commission to initiate proceedings, but mandated that the Commission "[r]equire all party states and other persons to perform their duties and obligations arising under this compact." Art. IV(m)(8). A Compact between states is "after all a contract. ... It remains a legal document that must be construed and applied in accordance with its terms. ... There is nothing in the nature of compacts generally ... that counsels against rectifying a failure to perform in the past as well as ordering future performance called for by the Compact." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (internal quotations and citations omitted). This court has already held that "revocation or suspension of a state's membership is [not] the exclusive enforcement mechanism" under the Compact. *Entergy, Arkansas, Inc.*, 210 F.3d at 897. By entering into a compact in which the party states delegated to the Commission their authority to sue for breach and required the Commission to enforce contractual obligations, Nebraska waived its Eleventh Amendment immunity from suit by the Commission in federal court.

Nebraska also seeks to obtain review of the district court's denial of its motion to dismiss the Commission's action for failure to state a claim upon which relief can be granted. Nebraska argues that the Commission has failed to state a claim because it is not a party to the Compact and the Compact does not provide for damages, but we have resolved the underlying issue by holding that the Commission has the right to sue under the Compact for the relief it seeks. Whether the Commission has stated a claim is thus intertwined with Nebraska's Eleventh Amendment argument, and we have jurisdiction to decide it. *See Kincade*, 64 F.3d at 394. We hold that since the Compact could permit the relief sought, the Commission has stated a claim, and the district court did not err by denying the motion to dismiss. We af-

firm the district court's decision in respect to the Commission's claims.

III.

Nebraska also argues that the district court erred when it denied its motion to dismiss the claims of the Generators and USE. Nebraska argues that qualified immunity bars the claims under the Compact and the due process clause against the state officials in their individual capacity. Nebraska also asserts that the claims against the state and the officials in their official capacity are barred by the Eleventh Amendment. Nebraska further contends that the appellees failed to state a claim upon which relief can be granted under the Compact and the due process clause.

Qualified immunity shields state officials performing discretionary functions from liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Nebraska asserts that the Generators and USE have not alleged violations of federal law because they cannot enforce the good faith provision in the Compact and they do not have a constitutionally protected property interest and thus lack due process rights. Nebraska also denies that its actions could amount to due process violations and claims that the state administrative proceeding on the amended application can overcome any procedural defects that may have occurred earlier. Finally, Nebraska argues that its officials acted rationally in denying the application. The Generators and USE respond by arguing that they can enforce the good faith provision in the Compact. They also assert that they have alleged violations of their due process rights. They claim they have a protected property interest created by their payment of over $80 million in costs by April 1999 with the expectation

that the license application would receive a timely review based on the Nebraska Administrative Code (N.A.C.) (a license shall issue if twelve requirements are met.) *See* N.A.C. tit. 194, Ch. 3, § 009. Moreover, they contend that the limited nature of the enjoined case proceeding was such that it could not remedy prior procedural violations. Finally, they argue that the actions of the state officials were so arbitrary that they violated their substantive due process rights.

A.

On our de novo review of the district court's ruling denying qualified immunity on the claims of the Generators and USE under the Compact, we must examine whether appellees have alleged the violation of any clearly established federal constitutional or statutory rights. *See Whisman v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. 1997). We have already held that the Compact is federal law, *see Entergy, Arkansas, Inc.*, 210 F.3d at 897, but Nebraska argues that the good faith provision does not provide the Generators and USE with a clearly established federal statutory right. The Generators and USE respond that they are intended beneficiaries of the Compact and therefore entitled to enforce the good faith promise in Article III(f). Three factors are relevant in determining whether a specific federal statutory provision gives rise to an enforceable federal statutory right: 1) "Congress must have intended that the provision in question benefit the plaintiff"; 2) "the right assertedly protected by the statute is not so 'vague and amorphous' that its enforcement would strain judicial competence"; and 3) "the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms." *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997) (internal citations omitted).

The Generators cite a number of Compact provisions related to them to show that they are intended beneficiaries of

the Compact and able to enforce the good faith provision. They argue that they are included in the definition of "Generators" because they manufacture nuclear waste. *See* Art. II(f). They also argue that Article III(a), which requires a party state to accept "all wastes generated within the region," was intended to benefit them because they produce waste. Art. III(a). According to the Generators, Article III(c) and (d) show they are intended beneficiaries because the rates for a "user shall be fair and reasonable . . . ." and they are "users" under the Compact. Art. III(c). The Generators also point out that Article VI(d) prevents states from making a generator's access to a waste facility more costly. *See* Art. VI(d). They further argue that the "take title" provision, which requires a violating state to take title to waste, demonstrates that Congress intended to benefit generators. *See* 42 U.S.C. §2021e(d)(2)(C) (2000). The Generators and USE all argue that they are included in the definition of "person" in Article II(m). *See* Art. IV(l). USE claims it is an intended beneficiary because Article V(b) allows the Commission to "seek applicants for the development and operation of regional facilities" and Article V(c) sets out the criteria for evaluating applications. Art. V(b) & (c). Finally, USE claims that it is benefitted by the requirement in Article V(e)(2) that a license issue in a reasonable time and that the Nebraska administrative process creates a benefit for applicants. *See* Art. V(e)(2). Nebraska responds that the Compact was enacted to benefit party states and the general public, not private entities, *see* Art. I, and that the language of Article III(f) is specifically limited to party states and does not refer to generators or applicants. *See* Art. III(f).

The provision the Generators and USE seek to enforce does not provide them with a federal statutory right. It is true that the Compact refers to entities like them and that some of its provisions might possibly provide them with an enforceable federal statutory right or a protected property interest

under state law (since the Compact was also enacted as original legislation by each member state). The Compact provision at issue here, however, is the one containing the obligation of good faith. Article III(f) of the Compact gives each member state the right to rely on "the good faith performance of each other." Article III(f) states that "[e]ach *party state* has the right to rely on the good faith performance of each other *party state*." (emphasis added). This provision does not name or suggest any other entities possessing such a right. Since we cannot say that Congress intended this provision to benefit the Generators and USE, we need not consider the other *Blessing* factors.

Article III(f) expressly limits to whom good faith is owed, and the Generators and USE are not included and would be at most incidental beneficiaries. Since these parties are unable to establish that Article III(f) provides them with a federal statutory right, the individual state officials could not have violated any clearly established law under it and they are entitled to qualified immunity on these claims. Their inability to enforce the good faith provision also means they have failed to state a claim upon which relief can be granted in respect to the claims they have asserted under the Compact. *See Kincade*, 63 F.3d at 394. We thus reverse the district court's ruling denying qualified immunity on these claims and denying the motion to dismiss them.

B.

The Nebraska officials also argue that they are entitled to qualified immunity on the procedural and substantive due process claims of the Generators and USE. The Generators and USE alleged that Nebraska has been deliberately delaying the review process since 1990, leading to their payment of more than $80 million in costs by April 1999 without achieving a license or closure in the process. They alleged

that Nebraska's tactics have deprived them of due process by threatening to begin review of the application anew, breaching the first contested case settlement and then the federal rebate settlement by slowing the review process, making incorrect statements about the timing of review, encouraging and engaging in numerous lawsuits, not following their own regulations, interpreting regulations in a way contrary to law, not providing fair procedures, not judging the license application on its merits, and denial of the license application for groundwater problems despite state findings that the site met suitability requirements. They also claim that key officials were improperly influenced by political pressure.

The Nebraska officials contend that they are entitled to qualified immunity from the procedural due process claims because the appellees do not have a constitutionally protected property interest, and even if they did, the administrative contested case proceeding with available judicial review can remove the effect of any past procedural violations. They also argue that they are entitled to immunity from the substantive due process claims because they acted rationally. The Generators and USE respond that they have a constitutionally protected property interest created by the $80 million they paid over the last eleven years in reliance on the N.A.C. which states that a license shall issue if twelve requirements are met. *See* N.A.C. tit. 194, Ch. 3, § 009. In their view the administrative contested case proceeding and opportunity for judicial review will not eliminate the effect of the past procedural violations because the administrative hearing officer has already ruled inadmissible any evidence of political taint in the licensing history. The Generators and USE assert that state officials have acted so egregiously with their delay tactics and the continuing intent to deny the application that they have deprived them of their rights to substantive due process.

In order to assert a procedural due process violation in this case, the parties agree that the Generators and USE must first establish a legitimate claim of entitlement to a property interest created by state law. *See Board of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972). An entitlement can be established by substantive standards or criteria that guide an official's discretion, *see Stauch v. City of Columbia Heights*, 212 F.3d 425, 429 (8th Cir. 2000), and in this case might possibly be found in the procedures and requirements listed in the N.A.C. for the issuance of a license, the requirement that the licensing process costs be paid by USE (and ultimately the Generators) and the very large payments already made in reliance on Nebraska's procedures, the administrative scheme set up by the Compact which was enacted into state law, or other state laws. A successful claim must also rest on a denial of fundamental procedural fairness, *see Fuentes v. Shevin*, 407 U.S. 67, 80 (1972), such as lack of fair procedures or impartial officials incapable of judging the license application on its merits. *See Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617-18 (1993); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Assoc.*, 426 U.S. 482, 493 (1976). The district court never discussed whether appellees have a protected property interest or a claim of denial of fundamental procedural fairness. *See Entergy, Arkansas, Inc.*, 68 F.Supp.2d 1108-10. It also never discussed qualified immunity in respect to such claims. *See id.* at 1108.

To assert a substantive due process violation in this case, the parties agree that the Generators and USE must establish a constitutionally protected property interest and that state officials used their power in such an arbitrary and oppressive way that it "shocks the conscience." *See County of Sacramento v. Lewis*, 523 U.S. 833, 845-46 (1998). This standard could be met if the officials' conduct was "intended

to injure in some way unjustifiable by any government interest," *id.* at 849; or if their actions were done with "deliberate indifference" to a party's protected rights in a situation where officials had an opportunity to consider various alternatives. *See Neal v. St. Louis County Bd. of Police Comm'rs*, 217 F.3d 955, 958 (8th Cir. 2000); *see also Whitley v. Albers*, 475 U.S. 312, 320 (1986).

In summarily denying the defense of qualified immunity and the motion to dismiss the claims of the Generators and USE, the district court only discussed claims asserted under the Compact. *See Entergy, Arkansas, Inc.*, 68 F.Supp.2d at 1108. It gave no indication that it had considered their constitutional claims or whether the officials were entitled to qualified immunity on them. *See id.* We thus lack jurisdiction over these issues, and remand for the district court to analyze and rule on them.[2] *See Jones v. Coonce*, 7 F.3d 1359, 1365 (8th Cir. 1993).

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[2] On remand the district court may have occasion to deal with various other issues not properly before us at this time, either because they were not resolved by the district court, *see Boatman's First Nat'l Bank of Kansas City v. Kansas Pub. Employees Ret. Sys.*, 57 F.3d 638, 641 (8th Cir. 1995), or because of the interlocutory nature of these appeals. *See Kincade*, 63 F.3d at 394. For example, Nebraska argues that the due process claims of the Generators and USE against the state officials in their official capacity are barred by the Eleventh Amendment; appellees respond that the Eleventh Amendment does not prevent a suit against state officials for prospective equitable relief to prevent violations of federal law. *See Ex parte Young*, 209 U.S. 123, 159-60 (1908). The district court ruled that the state officials are "generally immune" except for *Ex parte Young* relief, but it did not discuss the nature of the due process claims. *See Entergy, Arkansas, Inc.*, 68 F.Supp.2d at 1110. It also did not make clear the nature of any holding in respect to the state tort claims.

III

After a thorough study of the record and the briefs, we affirm in part and reverse in part. We affirm the district court's determination that Nebraska waived its Eleventh Amendment immunity under the Compact and that the Commission has not failed to state a claim. We reverse the denial of qualified immunity for the state officials on the claims by the Generators and USE which allege a violation of the good faith provision in the Compact. We also reverse the denial of Nebraska's motion to dismiss those good faith claims for failure to state a claim upon which relief can be granted. We decline to address issues over which we lack jurisdiction on these interlocutory appeals, and we remand for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 99-4263/4265

Central Interstate, etc., et al.	*	
	*	
Appellees,	*	Order Denying
	*	Petition for
vs.	*	Rehearing and
	*	for Rehearing
State of Nebraska, et al.,	*	En Banc
	*	
Appellants.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

(5128-010199)

April 17, 2001

Entergy Arkansas, Inc., an Arkansas corporation; Entergy Gulf States, Inc., a Texas corporation; Entergy Louisiana, Inc., a Louisiana corporation; Wolf Creek Nuclear Operating Corporation, a Delaware corporation; Omaha Public Power District, a public corporation and political subdivision of the State of Nebraska, *Plaintiffs*,

Central Interstate Low-Level Radioactive Waste Commission, *Realigned Plaintiff*,

US Ecology, Inc., a California corporation, *Intervenor-Plaintiff*,

vs.

State of Nebraska; Nebraska Department of Environmental Quality; Randolph Wood, individually and in his official capacity; Jay Ringenberg, individually and in his official capacity; Nebraska Department of Health and Human Services Regulation & Licensure; David P. Schor, individually and in his official capacity; Cheryl Rogers, individually and in her official capacity; and John Doe, Jane Doe and Doe Companies 1 through 20, individually and in their official capacities, *Defendants*.

Civil No. 4:98CV3411

United States District Court, District of Nebraska

September 15, 1999

MEMORANDUM AND ORDER

Kopf, District Judge.

The State of Nebraska, various state agencies, and individual state employees sued in their official and individual

capacities have filed motions to dismiss this case. In this opinion, I deal only with the motion to dismiss directed at the suit brought by the Central Interstate Low-Level Radioactive Waste Commission. That motion primarily raises the Eleventh Amendment as a reason to dismiss. For the reasons set forth below, I deny the motion to dismiss.

I. HISTORY

I presume a basic understanding of this case and the extraordinary litigation that preceded it. *See Entergy Arkansas, Inc. v. Nebraska*, 46 F. Supp. 2d 977 (D. Neb. 1999) (Central Interstate Low-Level Radioactive Waste Commission brought action alleging that the State of Nebraska, and certain of its agencies and employees, denied a disposal site license application for political reasons in violation of the "good faith" requirement imposed by an interstate compact; on Commission's motion for preliminary injunction staying an administrative appeal, the court held that an injunction was warranted), *appeal docketed*, No. 99-2376 (8th Cir. May 25, 1999).[1] Since I assume this knowledge, I will spend little time explaining the background of this case.

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[1] That decision has been appealed by Nebraska. However, the parties have agreed that the appeal should not delay consideration of this motion. More importantly, because this decision on the motion to dismiss does not reexamine or supplement the injunction decision, the appeal of the injunction does not divest this court of jurisdiction over the pending motion to dismiss. *Compare West Publ'g Co. v. Mead Data Central, Inc.*, 799 F.2d 1219, 1229 (8th Cir. 1986), *cert. denied*, 479 U.S. 1070 (1987) *and Janousek v. Doyle*, 313 F.2d 916, 920 (8th Cir. 1963) *with Missouri ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1106 (8th Cir.), *cert. denied*, 119 S. Ct. 2400 (1999). In addition, since I will deny Nebraska's motion to dismiss the Commission's suit, there is no likelihood that my ruling might incidentally deprive the Court of Appeals of jurisdiction or otherwise moot the appeal. Thus, I perceive no prudential considerations that should "stay [my] hand." *Coeur D'Alene Tribe*, 164 F.3d at 1107.

There are three categories of plaintiffs. The first category consists of the Central Interstate Low-Level Radioactive Waste Commission (Commission) that was created by the Central Interstate Low-Level Radioactive Waste Compact (Compact).[2] The Commission is responsible for the development of a low-level radioactive waste disposal site. The second category consists of US Ecology, Inc. (USE). The Commission hired USE to prosecute the license application and build the waste disposal site in Nebraska. The third category are the generators of nuclear waste (Generators). The Generators, who would use the site to store nuclear waste, partially funded the licensing and would have ultimately funded the building and operation of the site. The basic claim of every plaintiff is that the defendants acted in bad faith while denying a license to construct a low-level nuclear waste disposal site. Even at this early stage, there is a great deal of evidence to support this claim. *Id.* at 994-95.

The Commission sued only the State of Nebraska. (Filing 27, Pt. II at 11-23). The Commission claims Nebraska violated the "good faith" provisions of the Compact. (*Id.* ¶ 46 at 14-18.) It claims that Nebraska wrongfully took millions of dollars directly or indirectly from the Commission, wrongfully delayed the license decision, and wrongfully refused to issue a license to build a storage facility. The Commission specifically alleges that it has the responsibility under the Compact to require Nebraska to act in good faith. (*Id.* ¶ 43.) The Commission seeks: (1) damages; (2) an accounting; (3) a declaration that Nebraska has violated the Compact, especially the "good faith" provision; (4) removal of Nebraska from the licensing process; and (5) the appoint-

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[2] The Compact, as it exists currently, appears at Appendix § BB, Neb. Rev. Stat. Vol. 2A (Reissue 1989). Citations to the Compact will be to the article number (such as "ART. I") without further elaboration.

ment of an impartial third party to complete the licensing process. (*Id.* ¶ 47 at 18-20 & prayer at 20-23.)

The Compact's purpose is to provide a framework for a cooperative effort between the party states to promote the safe and efficient management of low-level radioactive wastes. ART. I. The Compact was enacted with the consent of Congress, and each signatory state recognized that "the Congress, by enacting the Low-Level Radioactive Waste Policy Act, . . . has authorized and encouraged states to enter into compacts for the efficient management of wastes." *Id.*

II. DISCUSSION

Keeping in mind that the Commission has sued only the State of Nebraska (and state employees in their official capacities), Nebraska's motion to dismiss is based upon the following grounds: (1) Nebraska has Eleventh Amendment immunity; (2) the Commission lacks standing; (3) suit is barred for lack of exhaustion of administrative remedies; (4) the court should abstain; and (5) suit is barred under the *Noerr-Pennington* doctrine. I reject each of these arguments.

The Eleventh Amendment immunity question is a difficult one. It presents a question of first impression. Nebraska's other arguments are of the "make-weight" variety and merit no discussion.

A. Eleventh Amendment Immunity

Nebraska contends that it cannot be sued by the Commission because it has immunity from suit under the Eleventh Amendment. I reject this argument for related reasons. Initially, the Eleventh Amendment does not apply to a suit against Nebraska by the entity created by the Compact and directed by Congress to serve as an enforcement mechanism. Alternatively, when Nebraska signed the Compact, it

consented to suits brought by a creature created to enforce the document.

The Specific Provisions of the Compact

The Compact, dealing with the disposal of low-level nuclear waste, creates a Commission, consisting of representatives from each state, to act for the party states in implementing the terms of their agreement. ART. IV. The Commission "is a legal entity separate and distinct from the party states and shall be so liable for its actions." ART. IV(k)(2).

If a party state has a dispute with the Commission, that state may seek review "in the United States District Court in the district wherein the commission maintains its headquarters . . . ." ART. IV(*l*). Furthermore, the Commission "shall . . . [h]ear and negotiate disputes which may arise between the party states regarding this compact." ART. IV(m)(3). In addition, the Commission "shall . . . [r]equire all party states and other persons to perform their duties and obligations arising under this compact by an appropriate action in any forum designated in section (e) of Article IV." ART. IV(m)(8).

Article IV(e) grants the Commission the power to "initiate any proceeding . . . before any court of law or any federal . . . agency . . . that has jurisdiction over any matter arising under or relating to the terms and provisions of this compact." ART. IV(e).[3] With regard to lawsuits of this kind,

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[3] This court has federal question jurisdiction over disputes regarding the Compact since an interstate compact is a federal law. *See, e.g., County of Boyd v. US Ecology, Inc.*, 48 F.3d 359, 361 (8th Cir.) ("An interstate compact is a creature of federal law"; therefore, federal question jurisdiction exists for the purpose of deciding whether duties under the Compact have been breached), *cert. denied*, 516 U.S. 814 (1995).

no party state has a veto over the decision of the Commission to commence the suit. ART. IV(b) (with exceptions not pertinent here, the majority rules).

The Commission alleges that Nebraska breached its duty of good faith under the Compact. ART. III(f) ("Each party state has the right to rely on the good faith performance of each other party state."). Therefore, the Commission argues that it is obligated under the Compact to sue Nebraska; that is, the Commission "shall . . . [r]equire all party states and other persons to perform their duties and obligations arising under this compact by an appropriate action in any forum designated in section (e) of Article IV." ART. IV(m)(8).

The Context of the Eleventh Amendment Dispute

Consequently, the question is whether an entity created by a compact to enforce the terms of the document is prohibited from suing one of the party states because of the Eleventh Amendment. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

The Supreme Court has made it clear that the Eleventh Amendment is expansive in its protection of state sovereignty. *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999) (although the Patent and Plant Variety Protection Remedy Clarification Act expressly abrogated the States' sovereign immunity, the Act's abrogation of immunity is invalid because it cannot be sustained as legislation enacted to enforce the guarantees of the Fourteenth Amendment's Due Process Clause) (*Florida Prepaid*); *College Savings Bank v. Florida Prepaid Post-*

secondary Educ. Expense Bd., 119 S. Ct. 2219 (1999) (a federal court had no jurisdiction to entertain the suit because the Trademark Remedy Clarification Act, subjecting states to suit brought under the Lanham Act, did not validly abrogate Florida's sovereign immunity since no property right within the meaning of the Fourteenth Amendment was at stake and Florida did not waive its immunity) (*College Savings Bank*); *Alden v. Maine*, 119 S. Ct. 2240 (1990) (Fair Labor Standards Act suit could not be brought against Maine in its own courts because the States' immunity from private suit is beyond Congressional power to abrogate by Article I legislation and Maine had not consented to suit) (*Alden*); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (Congress lacked power under the Commerce Clause to abrogate States' sovereign immunity) (*Seminole Tribe*).

None of these cases, however, deal with an interstate compact signed by a state-defendant, approved by Congress under the Compact Clause of the Constitution, which is sought to be enforced by a compact-created entity that brings suit against the state-defendant. The Compact Clause provides that "[n]o State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ." U.S. CONST. art. I, § 10, cl. 3.

Disputes placing at issue both the Compact Clause and the Eleventh Amendment are unique. As Justice Scalia put it, those cases are "fundamentally different." *College Savings Bank*, 119 S. Ct. at 2231. It is with the understanding that this case is "fundamentally different" from other Eleventh Amendment controversies that I now turn to Nebraska's argument.

B. The Amendment Does Not Apply to Suits by Compact Clause Entities

At first, the Eleventh Amendment would not seem to have any relevance to the Commission's suit against Nebraska. The Amendment, read literally, bars only suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Obviously, the Commission is not a "Citizen" or "Subject" of any particular State or of any Foreign State.

However, "sovereign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself." *Alden*, 119 S. Ct. 2254 (citations omitted). Thus, "the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Id.* The "Court has upheld States' assertions of sovereign immunity in various contexts falling outside the literal text of the Eleventh Amendment." *Id.* at 2253. Nonconsenting states have been held to be immune from suits brought by citizens of the same state, *Hans v. Louisiana*, 134 U.S. 1, 14-15 (1890), from suits brought by federal corporations, *Smith v. Reeves*, 178 U.S. 436 (1900), from suits by foreign nations, *Principality of Monaco v. Mississippi*, 292 U.S. 313, 329 (1934), and from suits by Indian tribes, *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). Likewise, even though the word "admiralty" is not mentioned in the Eleventh Amendment, sovereign immunity applies in the context as well. *Ex parte New York*, 256 U.S. 490 (1921).

Consequently, we must dig deeper. We must examine the "fundamental postulates implicit in the constitutional design." *Alden*, 119 S. Ct. at 2254. I proceed to that task next.

Nebraska Received a "Gratuity" When Congress Consented to the Compact

Writing for the Court, Justice Scalia has made clear that: "Under the Compact Clause, U.S. Const., art. I, § 10, cl. 3, States *cannot* form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *College Savings Bank*, 119 S. Ct. at 2231 (emphasis in original). Nebraska argues that as a recipient of a gratuity, it can ignore the terms of the gift. It claims that it has immunity because Nebraska is a sovereign even though the Commission is "required" to sue the State in "any forum" or "any court of law" chosen by the Commission. That position ignores the "fundamental difference" that Justice Scalia wrote about.

The Constitution Provides for Two Methods of Resolving Disputes Between States

The Constitution established two methods for resolving disputes between the states. *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 n.5 (1959) (assuming a commission created by an interstate compact had Eleventh Amendment immunity, such immunity was waived by the compact itself). The first method is the original jurisdiction conferred upon the Supreme Court by the Constitution to resolve disputes between the states. *Id.* (citing U.S. CONST. art. III., § 2). "The other is the compact . . . ." *Id.* (citation omitted).

As for the first method, we know that when the Supreme Court exercises its original jurisdiction there is no sovereign immunity and the Eleventh Amendment does not apply. *Texas v. New Mexico*, 482 U.S. 124, 130 (1987) (holding that monetary relief could be awarded against New Mexico because it acted in bad faith by failing to deliver water called for by a compact). As the Supreme Court said,

"[i]n proper original actions, the Eleventh Amendment is no barrier, for by its terms, it applies only to suits by citizens against a State." *Id.* *See also Alden*, 119 S. Ct. at 2267 ("In ratifying the Constitution, the States consented to suits brought by other States . . . .").

What about the second method? Specifically, what should we make of the claim of sovereign immunity when a signatory state is sued by a Compact Clause entity? In order to understand why signatory states to a compact possess no sovereignty, and thus no immunity, in suits brought by Compact Clause entities, one must understand the obscure history of U.S. CONST. art. I, § 10, cl. 3.

History Supports the Proposition that at the Founding the States Retained No Sovereignty Regarding Compact Conditions Imposed by Congress

"[T]he history of the constitutional provisions providing for this resource of state-craft ha[d] received scant attention" until May of 1925 when Felix Frankfurter and James M. Landis published their seminal work on the subject. *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution–A Study in Interstate Adjustments*, 34 Yale L.J. 685, 691-92 (1925) ("*The Compact Clause of the Constitution*").[4] "The records of the Constitutional Convention furnish no light as to the source and scope of this compact provision of Article I, Section 10." *Id.* at 694. The Federalist papers did not provide any insight either. *Id.* How-

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[4] A few years before *The Compact Clause of the Constitution* was written, the Supreme Court gave a brief historical explanation of that provision of the Constitution. *See Virginia v. West Virginia*, 246 U.S. 565, 597-600 (1918). The Court's interpretation was consistent with the later assertions of Frankfurter and Landis. For a more recent history, see *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 460-72 (1978).

ever, "the history of the times furnishe[d] ample commentary." *Id.*

According to Frankfurter and Landis, the "framers were familiar with the modes of settlement [between colonies] prior to the Revolution . . . ." *Id.* At that time, there were two methods for resolving disputes between the colonies. *Id.* at 692-93. These methods normally began with "[n]egotiations between the contending colonies." *Id.* at 692.

If the negotiations were fruitful, "the further approval of the Crown was required." *Id.* (citing *South Australia v. Victoria*, 12 C.L.R. 667, 704 (1911) (quoting Lord Mansfield stating: "I apprehend His Majesty will confirm their agreement, which of itself is not binding upon the Crown . . . .")). Thus, a settlement, but only after it was approved by the Crown, was the first method for resolving disputes between contentious colonies.

The second method, if settlement was not possible or negotiations were not pursued, "was an appeal to the Crown, followed normally by a reference of the controversy to a Royal Commission."[5] *Id.* at 693. If the Royal Commission's decision was not acceptable, then "an appeal lay to the Privy Council" because the Crown was normally too busy to hear those disputes directly.[6] *Id.*

"Historically the consent of Congress, as a prerequisite to the validity of agreements by States, appears as the

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[5] It is probably not accidental that the Commission, in the Compact before this court, appears to be the Congressional equivalent of the Crown's reference to a "Royal Commission."

[6] Again, the provision in the Compact, authorizing the Commission to select "any court of law" in which to sue Nebraska, fits nicely as the Congressional equivalent of the Crown's delegation to the Privy Council.

republican transformation of the needed approval by the Crown." *Id.* at 694. But it was not only history that motivated the framers; they had "very practical objectives in view in conditioning agreement by States upon consent of Congress." *Id.*

Even agreements between states that involve no disputes "may affect the interests of States other than those parties to the agreement: the national, and not merely a regional, interest may be involved." *Id.* at 695. Therefore, the Constitution was drafted to provide that "Congress must exercise national supervision through its power . . . . to grant [consent] under appropriate conditions." *Id.* To make the point clear, the Constitution specifically *prohibits* the states from entering into compacts *unless* Congress approves. *Id.* at 691 n.25. This is why the authority for the States to enter into compacts finds its place "in a section [of the Constitution] dealing with restrictions upon the States." *Id.* The "framers thus astutely created a mechanism of legal control" of the States. *Id.* at 695.

Precedent Supports the Proposition that Congress Has the Plenary Power to Attach Enforcement Conditions to Compacts and the Eleventh Amendment Does Not Limit that Power

What does this history mean? The history is understandable if we remember Justice Scalia's remarks. Compact Clause cases are "fundamentally different" when it comes to Eleventh Amendment analysis. This is because Congressional approval under the Constitution is a "gratuity." *College Savings Bank*, 119 S. Ct. at 2231.

When the States engage in activities not specifically restricted by the Constitution, they generally enjoy Eleventh Amendment immunity. However, if they enter into an arena from which they were, at the Founding, specifically barred,

then quite different rules apply. Those rules come with the consent ("gratuity" in the words of Justice Scalia) of Congress. In that circumstance, the States must accept the controls placed upon them by Congress. Therefore, in a case involving a suit brought by a Compact Clause entity specifically authorized to sue a signatory state, the Eleventh Amendment is not applicable, since, at the Founding, the state had no right whatever to pursue the object of the compact. Simply put, a signatory state has no immunity from suit by a Compact Clause creation because that state had no sovereignty (power) over the enforcement mechanism chosen by Congress.

This view is supported by *Virginia v. West Virginia*, 246 U.S. at 600-602. That case involved a compact approved by Congress that resulted in a judgment against West Virginia for more than $12 million. West Virginia argued that the debt could not be enforced against it. The Supreme Court recognized that the Eleventh Amendment had overruled the Court's holding in *Chisholm v. Georgia*, 2 Dall. 419 (1793). *Id.* at 600.

Nevertheless, after surveying the history that Frankfurter and Landis were later to explore in more depth, the Court ruled that "*the power of Congress to refuse or to assent to a contract between States carried with it the right, if the contract was assented to and hence became operative by the will of Congress, to see to its enforcement.*" *Id.* at 601 (emphasis added). That enforcement "*power is plenary and complete*" subject only to the requirement that it be relevant and appropriate to Congressional power under the Compact Clause. *Id.* at 602 (emphasis added).

The Court thus concluded that "by the very fact that the national power is paramount in the area over which it extends, the lawful exertion of its authority by Congress to

compel compliance with the obligation resulting from the contract between the two States which it approved *is not circumscribed by the powers reserved to the States*." *Id.* (emphasis added). The Court then generally found for Virginia. *See also Texas v. New Mexico*, 482 U.S. at 130 (citing *Virginia v. West Virginia* for the proposition that "[t]he Court has recognized the propriety of money judgments against a State in an original action. . . and specifically in a case involving a compact . . . . ").

The Commission is a Creature of the Compact, Possessing Reasonable and Carefully Delegated Enforcement Powers

But what about a Compact Clause entity? Is it appropriate that such an entity has the power to sue a recalcitrant signatory state in "any forum" and in "any court of law" using "any proceeding" it chooses? The courts have given us some insight into that question, and the cases suggest, at least indirectly, that Compact Clause creations appropriately possess the power to sue a signatory state in whatever venue Congress gives as an option in the Compact.

Entities like the Commission enjoy "a significantly different position in our federal system than do the States themselves." *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 40 (1994) (holding that the Eleventh Amendment did not apply to a Compact Clause entity). As a matter of fact, "Compact Clause entities formed to deal with 'broad, region-wide problems' *should not be regarded as 'an affirmation of a narrow concept of state sovereignty,' but as 'independently functioning parts of a regional polity and of a national union.'*" *Id.* (emphasis added) (citation omitted). And, as our Court of Appeals has said, the Commission is an "interstate agency" possessing "a reasonable and carefully limited delegation of power." *Nebraska v. Central Interstate*

Low-Level Radioactive Waste Compact Comm'n, No. 98-3858, 1999 WL 615506, at *2 (8th Cir., Aug. 16, 1999) (citing *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951)).

Summary

Given the foregoing, Congress has the plenary power to provide for the enforcement of a compact, and such plenary power is not limited by the Eleventh Amendment. Moreover, when Congress approved this Compact "requiring" the Commission to sue Nebraska if it failed to perform its "duties and obligations" (by means of "any proceeding" in "any forum" or "any court of law" chosen by the Commission), the condition was both relevant and appropriate to Congress' power under the Compact Clause.

This is no surprise to Nebraska. In the past, it has argued that the State had a right to a jury trial in cases involving the Compact because "it may be subjected to a suit for damages for its failure to abide by the Commission's declarations . . . ." *Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n*, 974 F. Supp. 762, 769 n.7 (D. Neb. 1997) (sustaining objection to Nebraska's jury demand).

C. Nebraska Explicitly Consented to Suits Brought by the Commission

If I am wrong, and the Eleventh Amendment does apply to suits against a signatory state by a Compact Clause entity, Nebraska has nevertheless consented to the suit brought by the Commission. In arriving at this conclusion, I recognize that a "compact is a voluntary contract between states, and, if approved by Congress, it also becomes federal law." *Nebraska v. Central Interstate Low-Level Radioactive Waste Compact Comm'n*, 1999 WL 615506, at *2. Thus, while "cognizant that the State's sovereign powers are po-

tentially limited by the Compact, . . . a compact is a 'legal document that must be construed and applied in accordance with its terms.'" *Id.* (quoting *Texas v. New Mexico*, 482 U.S. at 128).

The Words, Structure, and Enabling Legislation of the Compact Provide for Federal Judicial Review

Nebraska consented to suit in this court brought by the Commission when it signed the Compact. The words and structure of the Compact, together with the enabling legislation, compel such a conclusion.

To be specific, Nebraska obligated itself to exercise good faith. ART. III(f) ("Each party state has the right to rely on the good faith performance of each other party state."). Nebraska agreed that if it did not act in good faith, the Commission was "required" to bring suit against it anywhere it chose. ART. IV(m)(8) (stating that the Commission "*shall ... [r]equire all party states ... to perform their duties ... arising under this compact by an appropriate action in any forum* designated in section (e) of Article IV.") (emphasis added). Article IV(e) grants the Commission the power to "initiate any proceedings ... before *any court of law, or any federal ...* agency ... that has jurisdiction over any matter arising under or relating to the terms and provisions of this compact." ART. IV(e) (emphasis added). Nebraska retained no right to veto such a suit. ART. IV(b) (with exceptions not pertinent here, the majority rules). Nebraska also agreed that its laws were subservient to the Compact in the event of an inconsistency. ART. VI(6)(b)&(c). Furthermore, Nebraska agreed it would not "enforce any law or regulation which is inconsistent with this compact." ART. VI(6)(b).

To argue that the Compact did not explicitly provide for a suit by the Commission against Nebraska in federal court also disregards the fact that interstate compacts have

historically been treated as federal laws subject to review by the federal courts. *See, e.g, County of Boyd v. US Ecology, Inc.*, 48 F.3d at 361 (citing *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)). Nebraska and Congress must have understood that the federal courts had federal jurisdiction over compact cases brought by Compact Clause entities explicitly "required" to sue a party state when such a state acted in derogation of the Compact.

Since the Founding, Congress has been constitutionally entrusted with the duty of authorizing compacts. Federal jurisdiction over compact suits has been the rule since at least 1851. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 13 How. 518, 566 (1851) ("This compact, by the sanction of Congress, has become a law of the Union."). *See Cuyler v. Adams*, 449 U.S. at 438-39 & n.7 (discussing the development and evolution of the "law of the Union doctrine").

When Congress assented to and enabled the formation of low-level nuclear waste compacts in 1980, it stated that federal judicial review was to be preserved. With exceptions not pertinent here, Congress emphasized that "nothing contained in . . . any compact may be construed to . . . alter, amend or otherwise affect any Federal law governing the judicial review of any action taken pursuant to any compact." 42 U.S.C. § 2021d(4). To read this Compact as prohibiting federal judicial review of Nebraska's alleged bad faith is to ignore the words of the Compact itself. As importantly, such a misreading also disregards the enabling legislation, predicated upon an express provision of the Constitution existing at the time of the Founding, which in turn was supported by pre-civil war Supreme Court precedent.

In 1851, the Supreme Court asked rhetorically: Once Congress assents to a compact, "[w]hat further legislation can be desired for judicial action?" *Wheeling & Belmont*

Bridge Co., 13 How. at 566. Where, as here, Congress explicitly "requires" a Compact entity to sue a signatory state and specifically preserves federal judicial review in the process, the answer to the Supreme Court's question is unmistakable. Nothing more is required. *See, e.g., Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985) (a state will be deemed to have waived Eleventh Amendment immunity where, "'by such overwhelming implication from the text,'" there is "'no room for any other reasonable construction.'") (citations omitted).

The Compact Specifically Provides for Federal Judicial Review of Disputes Between Nebraska and the Commission

That a federal court is a proper place to hear this suit, and that Nebraska actually knew that it was consenting to suit in this court, is also made plain by a closely related provision of the Compact. It gives specific jurisdiction to this court over disputes regarding the Compact. ART. IV(*l*) (If any party state has a dispute with the Commission, the state may seek review "in the United States District Court in the district wherein the Commission maintains its headquarters . . . within sixty days after the commission's final decision.").

Since Nebraska is specifically directed to litigate in federal court when it disputes the Commission's actions[7], it is whimsical to argue that the Commission lacks the right to do the same thing. This is all the more true when one remembers that the Commission is "required" under the Com-

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[7] In fact, if Nebraska does not do so within 60 days, it loses its right to contest the Commission's action. *Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n*, 834 F. Supp. 1205 (D. Neb. 1993), *aff'd*, 26 F.3d 77 (8th Cir.), *cert. denied*, 513 U.S. 987 (1994).

pact to prosecute Nebraska, utilizing "any proceeding," "in any forum" and "in any court of law" or "federal agency" that the Commission may select.

Supreme Court Precedent Supports the Commission's Suit

Although no case is precisely on point, two Supreme Court opinions tend to support the Commission's construction of the Compact. I turn to those cases next.

Despite assuming that Eleventh Amendment immunity might apply to Compact Clause entities when sued by private individuals, the Supreme Court has found that consent to suit in federal court exists where Congress "approved a sue-and-be-sued clause in a compact under conditions that make it clear that the States accepting it waived any immunity from suit which they otherwise might have." *Petty*, 359 U.S. at 280. In a similar vein, and assuming once again that a compact entity might otherwise possess Eleventh Amendment immunity from suits by private individuals, the Supreme Court found that consent to suit against the entity existed where the compact contained a sue-and-be-sued clause plus a venue provision providing for suit in federal court. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304-09 (1990).

The *Petty* and *Feeney* analysis is equally applicable here. Not only did Nebraska give the Commission the general power to sue when it signed the Compact, it "required" the Commission to sue Nebraska "in any forum" and "in any court of law" selected by the Commission. Moreover, the Compact made clear that a federal judicial forum was appropriate. It specifically gave this court jurisdiction to hear disputes between Nebraska and the Commission.

Nebraska's Construction of the Compact Could Render It Unenforceable

Nebraska must also admit that its construction of the Compact would render the Commission potentially powerless to do the work entrusted to it by the signatory states and Congress. To be specific, Nebraska's construction would frustrate the purpose of the Compact since it could permit Nebraska to escape from its obligation to exercise good faith.

If Nebraska is correct, and the Commission cannot sue in federal court to enforce the "good faith" provision, it would also appear that the Commission would lack the power to sue in state court. *Alden*, 119 S. Ct. at 2269 (under the Fair Labor Standards Act, Congress could not subject Maine to suit in the state courts absent consent by that State). Moreover, even if the Commission could bring suit in the Nebraska courts, Nebraska has already used its powers to control the administrative process to block consideration of the "bad faith" issue by state hearing officers and judges. *Entergy Arkansas, Inc. v. Nebraska*, 46 F. Supp. 2d at 988-89, 989 n.12, & 993-94 (upon the insistence of the State of Nebraska, the hearing officer expressed an unwillingness to consider "bad faith"; also indicating that a state district judge is apparently limited to the record made by the hearing officer). While the Commission would still have the power to sue for prospective equitable relief against state officials, such relief might be insufficient to remedy past misbehavior. *Compare, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974) (monetary relief awarded by a prospective injunction was not warranted) *with Milliken v. Bradley*, 433 U.S. 267 (1977) (authorizing prospective injunctive relief that was monetary in nature). *See also Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 280-81 (1997) (stating that a case-by-case approach is required).

Consequently, the "good faith" provision of the Compact might become only advisory if one accepts Nebraska's Eleventh Amendment argument. Such a result is not acceptable because it unnecessarily ignores the plain meaning of the Compact. *See Nebraska v. Central Interstate Low-Level Radioactive Waste Compact Comm'n*, 1999 WL 615506, at *4 (refusing to construe Compact's "reasonable period provision" in a manner that would render it "merely hortatory").

Nebraska Relies Upon "Private Suit" Cases that Have Little Relevance to a Suit Brought by a Compact Clause Creation

The cases principally relied upon by Nebraska involved suits brought by *private* parties and not constitutional creations like the Commission. In those types of cases, the Court has been particularly careful not to allow a waiver to be implied.[8] However, because Nebraska agreed to the Commission's powers, the "private citizen-Eleventh Amendment" cases relied upon by Nebraska are largely irrelevant to the question presented by Commission's suit.[9] *Hess*, 513 U.S. at 41-42 ("As part of the federal plan prescribed by the Constitution, the States agreed to the power sharing, coordination, and unified action that typify Compact Clause creations.") (footnote omitted). In contrast to suits

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8 This court has also been careful to protect Nebraska from unauthorized suits by private individuals in federal court. *See, e.g., Doran v. Condon*, 983 F. Supp. 886 (D. Neb. 1997) (Nebraska's Tort Claim act did not waive Nebraska's Eleventh Amendment immunity for suits in federal court).

9 However, those cases do have relevance to the claims brought by USE and the Generators. They are not parties to the Compact. But, as noted earlier, I do not now decide Nebraska's motions as they pertain to the claims brought by those private parties.

brought by Compact Clause entities, it was "the fear of private suits against nonconsenting States" that "was the central reason given by the founders who chose to preserve the States' sovereign immunity." *Alden*, 119 S. Ct. at 2267. In fact, and in contrast to private suits, "the Constitution contemplates suits among the members of the federal system as an alternative to extralegal measures . . . . *Id.* at 2267.

In short, Nebraska agreed to this suit by signing the Compact which not only permitted but "required" the Commission to sue Nebraska. The Eleventh Amendment was designed to protect states from private suits as opposed to suits among members of the federal system. Given these two points, I am not persuaded by Nebraska's reliance upon cases that have nothing to do with Compact Clause creations.

Summary

When it signed the Compact, Nebraska consented to a suit brought by the Commission in federal court. The words and structure of the Compact and the Congressional enabling legislation plainly authorize the Commission's suit. In fact, the Commission is "required" to sue Nebraska in "any forum" and in "any court of law" chosen by that body. Still further, the Compact specifically provides that the federal court has the power to review disputes between the Commission and Nebraska.

Nebraska's interpretation of the Compact would product the senseless result that it has the right to sue the Commission in federal court when a dispute arises under the Compact, but the Commission, which is charged with enforcing the Compact, does not. Nebraska's construction would also make the "good faith" provision potentially meaningless since the Commission's remedies would be limited. Still further, Nebraska primarily relies upon cases involving private suits, and those cases are constitutionally,

and therefore categorically, different from a suit brought against a signatory state by a Compact Clause creation.

D. Monetary Relief

If the Commission is successful in this suit, it might recover nearly $100 million from Nebraska's treasury. I am acutely aware that one (but not the only) purpose of the Eleventh Amendment is to protect the States' treasuries. *See, e.g., Seminole Tribe*, 517 U.S. at 58.

Nonetheless, if Nebraska lacks Eleventh Amendment immunity either because the Eleventh Amendment does not apply to suits brought by Compact Clause creations against signatory states or because Nebraska consented to the suit, a monetary judgment may be entered against Nebraska. *Texas v. New Mexico*, 482 U.S. at 130 ("We have now agreed. . . that New Mexico has not fully performed, and we are quite sure that the Compact itself does not prevent our ordering a suitable remedy, whether in water or money.") (citing *Virginia v. West Virginia*, 246 U.S. 565). *See also* 13 Charles Alan Wright *et al., Federal Practice and Procedure*, § 3524, at 190 (1984) ("Once a state consents to suit or waives its Eleventh Amendment immunity, the federal court has jurisdiction and the relief available to the plaintiff is not limited by the amendment."). Thus, no matter how one looks at the issue, Nebraska may have to pay a large amount of money if it is found to have acted in bad faith.[10]

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[10] Extreme care, however, must be exercised before imposing a money judgment on Nebraska. *See, e.g., Texas v. New Mexico*, 482 U.S. at 130-31 ("That there may be difficulties in enforcing judgments against States counsels caution but does not undermine our authority . . . .")

III. CONCLUSION

The Commission's suit presents a unique and difficult question of first impression regarding whether Nebraska has Eleventh Amendment immunity when sued by a Compact Clause entity. Because the Eleventh Amendment does not pertain to Compact Clause entities when they sue a signatory state to a compact, I deny Nebraska's motion to dismiss on Eleventh Amendment grounds. Alternatively, when Nebraska signed the Compact, it consented to the Commission's suit in federal court and, therefore, Nebraska's motion must be denied on that basis as well. Accordingly, and because the other arguments raised by Nebraska lack merit,

IT IS ORDERED that the motion to dismiss (filing 50), to the extent the motion is directed to the claims of the Commission, is denied. As a matter of courtesy, and, in addition to mailing a copy of this opinion to the lawyers, the Clerk shall mail a copy of this opinion to the Clerk of the United States Court of Appeals for the Eighth Circuit. He is requested to make a copy of this opinion available to the panel considering the defendants' pending appeal of the preliminary injunction.

Entergy, Arkansas, Inc.; Entergy Gulf States, Inc.; Entergy Louisiana, Inc.; Wolf Creek Nuclear Operating Corp.; Omaha Public Power District; Central Interstate Low-Level Radioactive Waste Compact Commission, *Plaintiffs-Appellees*,

US Ecology, Inc., *Intervenor*,

v.

State of Nebraska; Nebraska Department of Environmental Quality; Randolph Wood; Jay Ringenberg; Nebraska Department of Health and Human Services Regulation & Licensure; David P. Schor; Cheryl Rogers, *Defendants-Appellants*.

John Doe; Jane Doe; and Doe Companies 1 through 20, *Defendants*.

No. 99-2376

United States Court of Appeals, Eighth Circuit

Submitted: January 10, 2000
Filed: April 12, 2000

Appeal from the United States District Court for the District of Nebraska (Kopf, Chief District Judge)

Before WOLLMAN, Chief Judge, and MORRIS SHEPPARD ARNOLD and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

The Central Interstate Low-Level Radioactive Waste Commission (the Commission) and Entergy Arkansas, Entergy Gulf States, Entergy Louisiana, Wolf Creek Nuclear

Operating Corporation, and the Omaha Public Power District (the Utilities) brought this action against the State of Nebraska, its Department of Environmental Quality (EQ) and its Department of Health and Human Services and Licensure (HHS),[1] and several individually named state officers (collectively Nebraska). The plaintiffs alleged that Nebraska had breached obligations owed under the Central Interstate Low-Level Radioactive Waste Compact (the Compact), which Nebraska, Arkansas, Kansas, Louisiana, and Oklahoma had joined in 1986. In the Compact the states agreed to develop disposal facilities for low level nuclear waste generated within their borders, and in 1989 the Commission selected Nebraska as the host state for such a facility. The Commission and the Utilities allege that Nebraska has attempted to evade its obligations under the Compact since 1991, by delaying the decision on a license for the proposed facility and by then wrongfully denying a license. They seek injunctive relief, a declaratory judgment that Nebraska has violated its fiduciary and contractual obligations under the Compact, an accounting, compensatory and consequential damages, the removal of Nebraska from further supervision of the licensing process and appointment of a third party to exercise supervision, and attorney fees and costs. This appeal by Nebraska is from a preliminary injunction issued by the district court[2] which enjoined the state parties from continuing with

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[1] HHS was previously known as the Nebraska Department of Health. For ease of reference, the department is referred to as HHS throughout this opinion.

[2] The Honorable Richard G. Kopf, Chief Judge, United States District Court for the District of Nebraska.

the administrative proceeding related to denial of the license for the disposal facility.[3] We affirm.

I.

A.

Congress passed the Low-Level Radioactive Waste Policy Act of 1980 (the Act), 42 U.S.C. § 2021b et seq. (1994) (amended 1986), "to promote the development of regional low-level radioactive waste disposal facilities." *Concerned Citizens of Neb. v. U.S. Nuclear Regulatory Comm'n*, 970 F.2d 421, 422 (8th Cir. 1992). Under the authority of the Act the member states entered into the Compact, which was passed as original legislation by each of the states and by Congress. *See Neb. Rev. Stat.* § 71-3521 (1996 Reissue) *repealed by Neb. Rev. Stat.* § 71-3522 (effective August 28, 1999) *and* Omnibus Low-Level Radioactive Waste Interstate Compact Consent Act, Pub. L. 99-240, tit. II, sec. 222, 99 Stat. 1859, 1863 (1986) (reprinting the Compact hereinafter referred to by article). The Compact established the Commission and provided the framework for licensing a facility for the disposal of low level radioactive waste generated in the five states. *See* Art. III *and* IV. Several provisions address performance of obligations imposed by the Compact. Each of the states has "the right to rely on the good faith performance of each other party state." Art. III.f. The state selected as the host for a disposal site is required "to process all applications for permits and licenses required for the development and operation of any regional facility or facilities

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[3] Also pending in this court are appeals by Nebraska, docketed on December 17, 1999, from orders of the district court denying its motions to dismiss the claims against it. *See Entergy Ark., Inc. v. Nebraska*, 68 F. Supp. 2d 1093 (D.Neb. 1999), appeal No. 99-4263 and *Entergy Ark., Inc. v. Nebraska*, 68 F. Supp. 2d 1104 (D.Neb. 1999), appeal No. 99-4265.

within a reasonable period from the time that a completed application is submitted." Art. V.e.2. The Commission is authorized to "require all party states . . . to perform their duties and obligations arising under this compact[.]" Art. IV.m.8.

After the Commission selected Nebraska as the host state for a radioactive waste disposal facility in December 1987, it contracted with intervenor US Ecology to construct and maintain the facility. Nebraska established procedures and standards for licensing the facility. Under the state regulations, US Ecology was required to pay all costs associated with licensing, *Neb. Rev. Stat.* § 81-1579(2) (1999 Reissue), but the Commission agreed to reimburse US Ecology for these costs. Through separate agreements the Commission passed these costs along to the Utilities. The licensing proceedings to date have cost more than $74 million.

US Ecology submitted its original license application for the construction of a low level radioactive waste disposal facility in Boyd County, Nebraska in 1990. The application was directed to the Low Level Radioactive Waste Program, operated by EQ and HHS. Nebraska proceeded to address some 700 questions and comments to US Ecology, all of which required a response. *Entergy Ark., Inc. v. Nebraska*, 46 F. Supp. 2d 977, 981 (D.Neb. 1999). After US Ecology responded to the open questions and comments, Nebraska declared the license application complete in December 1991. *Id.* at 982. EQ and HHS then reviewed the application and issued a Notice of Intent to Deny in January 1993. *Id.* at 983. The stated reason for the denial was "evidence of flooding, frequent ponding, and wetlands on the site, which . . . indicate[s] that the site is not generally well drained . . . contrary to minimum site characteristics." Appellee's App. II, 387.

US Ecology initiated an appeal from the denial of the facility license by opening a contested case proceeding under Nebraska law, but it later withdrew this appeal in favor of filing an amended license application. *Entergy Ark., Inc.*, 46 F. Supp. 2d at 983. By the end of 1994, US Ecology had undergone another four rounds of technical review, in which it had addressed 1,791 comments by Nebraska on the Safety Analysis Report in the license application and 425 comments on the Environmental Report. This application was deemed complete in June 1995. *Id.* EQ and HHS acknowledged receipt of the completed application in July 1995 and stated that final review activity had commenced and would require approximately one year. The two departments also declared that no further information would be accepted from US Ecology. *Id.* at 984. In August 1996 EQ informed US Ecology that two license review documents, the Draft Environmental Impact Statement and the Draft Safety Evaluation Report, would not be completed until October 1997, more than two years after US Ecology had submitted its application. *Id.*

Following this announcement, the Commission met to impose a deadline for the completion of Nebraska's administrative review. It set January 14, 1997 as the deadline for action on US Ecology's license application. Nebraska then sued the Commission in federal court to contest its authority to set such a deadline. The district court's decision upholding the Commission's authority was affirmed by this court. *See Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n*, 187 F.3d 982, 987 (8th Cir. 1999).

Nebraska denied US Ecology's second license application in December 1998. The state asserted that the site provided insufficient depth to the water table which increased the likelihood of groundwater contamination, that engineered improvements to the site could not be considered under the applicable regulations, and that US Ecology had not demon-

strated its financial ability to construct and maintain the disposal facility. Appellee's App. II, 463-77. US Ecology appealed the denial by again initiating a contested case proceeding under Nebraska law.[4]

While US Ecology's license applications were pending, a number of unsuccessful lawsuits were brought by Nebraska, two community groups (Concerned Citizens of Nebraska and the Boyd County Local Monitoring Committee), and Boyd County. *See County of Boyd v. US Ecology, Inc.*, 48 F.3d 359 (8th Cir. 1995) (claims barred by previous decision on community consent claim); *Nebraska ex. rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n*, 26 F.3d 77 (8th Cir. 1994) (community consent claim barred by expiration of limitations period); *Concerned Citizens of Neb. v. U.S. Nuclear Regulatory Comm'n*, 970 F.2d 421 (8th Cir. 1992) (no fundamental right to an environment free from radioactive contamination); *Nebraska v. Central Interstate Low-Level Radioactive Waste Comm'n*, 29 F. Supp. 2d 1085 (D.Neb. 1998), *aff'd*, 207 F.3d 1021 (8th Cir. 2000) (Nebraska has no veto power over export license); *and Nebraska ex rel. Nelson v. Central Interstate Low-Level Radioactive Waste Comm'n*, 902 F. Supp. 1046 (D.Neb. 1995) (Nebraska had no right to an additional member on the Commission).

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[4] Under Nebraska law, the hearing officer who presides over the contested case proceeding is appointed by the agency head whose decision is being appealed. *See Neb. Rev. Stat.* § 84-913 et seq. (1999 Reissue); *Slack Nursing Home v. Dept. of Social Servs.*, 528 N.W.2d 285, 291 (Neb. 1995). The hearing officer makes a recommendation to the agency head, who makes the final decision. That decision may then be appealed to the Nebraska district court, which reviews the decision de novo on the administrative record. *See Neb. Rev. Stat.* § 84-917(5)(a) (1999 Reissue). In this case, EQ and HHS appointed former Chief Justice Thomas White of the Nebraska Supreme Court to preside over the contested case proceeding.

In all of these actions the plaintiffs contested some application of the Compact to Nebraska.

After US Ecology sought to appeal the denial of its amended application to construct the facility through a contested case proceeding, the Utilities filed this action and moved for a temporary restraining order and a preliminary injunction to enjoin the state proceeding. The Utilities alleged that Nebraska's actions to delay approval of a facility license violated their statutory and contractual rights under the Compact, as well as their constitutional rights. They sought preliminary and permanent injunctive relief to bar further state administrative proceedings, a declaratory judgment that Nebraska had violated its obligations under the Compact, money damages, and attorney fees.

The Utilities named the Commission as a defendant, but it moved to realign itself as a plaintiff and brought a cross-claim against Nebraska for impeding the licensing of the disposal facility in violation of the state's contractual and fiduciary obligations to the Commission. The relief the Commission sought included a declaratory judgment that Nebraska had violated its obligations under the Compact, an accounting of the funds received by Nebraska in prelicensing fees, damages, the removal of Nebraska from control over the licensing process, the appointment of a third party to complete the licensing process, and attorney fees. The district court granted the Commission's motion to realign itself as a plaintiff and issued a temporary restraining order and then a preliminary injunction. The current appeal by Nebraska is from the granting of the Commission's motion for preliminary injunctive relief.[5]

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[5] The Utilities had agreed to withdraw their injunction motion if the Commission's were granted.

B.

After a lengthy evidentiary hearing, the district court applied the *Dataphase* factors to the evidence and found that the Commission had demonstrated that it had a substantial likelihood of success on the merits and that it would suffer irreparable harm without injunctive relief. *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981) (en banc). The injunction was entered against all state defendants, restraining them from taking any further action in connection with the contested case proceeding involving US Ecology and the Commission, from collecting any funds from US Ecology, the Commission or the Utilities, and from spending any funds already collected.

The district court found bad faith on the part of Nebraska and that state officials had continuously and substantially interfered with the licensing process in order to deny a license to US Ecology. *Entergy Ark., Inc.*, 46 F. Supp. 2d at 994. The court pointed to evidence from the hearing that Nebraska was biased against licensing any low level nuclear waste disposal facility. This included evidence of continuing interference by former Governor Ben Nelson in the licensing process. Nelson became governor in January 1991, after promising voters in Boyd County that "If I am elected governor, it is not likely that there will be a nuclear dump in Boyd County or in Nebraska." *Id.* at 981-82. After his election, an aide named Kate Allen wrote a memorandum to him advising "[u]pon taking office [you] will order a moratorium on further development of the facility/the current plan [referring to the Boyd County facility]." *Id.* at 982. The former director of the EQ, Randolph Wood, testified at the injunction hearing that Governor Nelson told him to treat US Ecology's license application fairly, *id.* at 990, but that he consulted privately with the governor before making key decisions. Such consultations preceded the denial of the original license applica-

tion in 1993, the tentative denial of the second license application in 1998, and the final denial of the second license application in December 1998. *Id.* An e-mail from Kate Allen suggested to her superiors in the governor's office that the Boyd County Local Monitoring Committee, the state-funded community group opposed to the facility, could "be used by the Governor to do things he cannot do directly[.]" *Id.*

The governor intervened in a 1992 dispute between EQ and HHS as to whether they could consider engineered improvements to the site in determining its suitability. EQ favored that position. HHS asserted, however, that the site had to be considered in its unimproved condition. The agencies sought an opinion on the issue from the Nebraska Attorney General. When Steve Moeller, an aide to the governor, discovered that the opinion would conclude that engineered improvements should be considered, he informed senior officials in the administration about the draft opinion and suggested that "marching orders" be given to the two agencies. Apparently believing that the draft conclusion would increase the likelihood of success for the license application, Governor Nelson met with officials from both agencies on January 11, 1993. US Ecology's initial application was denied by EQ and HHS eleven days later, and the opinion from the Attorney General was never issued. *Id.* at 991-992.

An opinion was also obtained from outside counsel before the denial of US Ecology's initial license application in January 1993. EQ Director Wood sought advice from Collier, Shannon & Scott[6] on whether wetlands made the Boyd County site unsuitable for the disposal of low level radioactive waste under Nebraska regulations. In a lengthy legal

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[6] Collier, Shannon & Scott is now Collier, Shannon, Rill, and Scott. The firm represented Nebraska as outside regulatory counsel in the administrative proceedings and continues to represent Nebraska in this case.

opinion dated October 1, 1991, Collier advised that placement of the disposal facility at the Boyd County site would not violate the regulations. Nonetheless, the January 1993 Notice of Intent to deny the license listed the presence of wetlands on the proposed site as one of the reasons for the denial. Wood explained at the evidentiary hearing that he had rejected the legal opinion because he read the regulations differently. Hearing Tr., 369-71. The district court found this explanation not credible. *See Entergy Ark., Inc.*, 46 F. Supp. 2d at 982-83.

The district court also found bad faith in Nebraska's continuing refusal to set a budget or a timeline for the licensing process. The state auditor of Public Accounts had recommended in June 1992 that the state adopt a budget and timetable and amend its contract with the primary contractor, HDR Engineering, Inc., to control costs. These recommendations were not followed. *Id.* at 982. EQ and HHS represented in June 1995 that their review of US Ecology's second license application would take approximately one year to complete. Then in August 1996, they informed US Ecology that two critical review documents, the Draft Environmental Impact Assessment and Draft Safety Evaluation Report, would not be ready for public review until October 1997. *Id.* at 984.

The district court found further evidence of bad faith in Nebraska's 'change of heart' between the issuance of the draft reports and the denial of the second license application in August 1998. Nebraska had represented in draft reports that contamination of groundwater through contact with radioactive waste under US Ecology's plan was "not plausible."[7] Nonetheless, EQ and HHS rejected the second license

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[7] Section 2.4 of the Draft Safety Evaluation Report (DSER) issued in October 1997 contains findings concerning the hydrological characteris-

application on the ground that the site would not adequately prevent groundwater contamination.[8] This assertion directly contradicted factual findings EQ and HHS had made in the draft reports.[9] *Id.* at 985-86. The district court found the reasons proffered by EQ and HHS officials for this change in their position to be not credible. Randolph Wood testified at the hearing that the change resulted from new information provided by US Ecology,[10] but the court found Wood's explanation insufficient to overcome the strong evidence that

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tics of the proposed site. One part of the report extensively analyzed the possibility of waste contaminating the site's groundwater and found that such contamination, even during periods of high groundwater, was "not plausible." DSER at 2-32 to 2-33.

[8] The denial of the license application listed six negative findings which implicated numerous Nebraska regulations. Five of those six findings relate to the potential contact between waste and groundwater. The sixth relates to US Ecology's financial ability to construct and maintain the facility.

[9] Findings in the second license denial directly contradict those in the DSER. Nebraska Administrative Code Title 194, Chapter 5, Section 001.01G states: "The disposal site shall provide sufficient depth to the water table that ground water intrusion, perennial or otherwise, into the waste will not occur. In no case will disposal be permitted in the zone of fluctuation of the water table." The 1997 Draft Safety Evaluation Report noted with respect to this regulation that "US Ecology concluded that, because all waste would be placed above grade, even a rising water table would not contact waste. The LLRW [Low Level Radioactive Waste] Program concurred with this position." DSER, at 2-32. In contrast, the 1998 denial of the license application stated "[t]he application does not provide an adequate zone between the waste and the water table to ensure that disposal will not occur in the zone of fluctuation of the water table." Appellee's App. II, 465.

[10] Wood testified that groundwater level hydrographs provided by US Ecology in June 1998, for the years 1995, 1996, and 1997, documented groundwater near or at the surface of the site that could potentially contact waste. Hearing Tr. 409.

the reasons for the license denial were pretextual. *Id.* at 985-86. The court noted that much of the 'new' information had been known to EQ and HHS no later than 1993, that the information had been provided on the express representation that it would not be used for purposes of technical review, and that the agencies had "eyeballed" the data in making the new findings in denying the license application, instead of using the computer models employed for the draft reports. *Id.* at 986. The district court found the failure to follow a consistent methodology "problematic at best, and evidence of bad faith at worst." *Id.*

The district court made numerous other findings supporting the inference that political factors had tainted the licensing process. The court noted that HHS had continued to participate in the licensing process even after a Nebraska state court had ruled that the department did not have statutory authority to review the license application, *id.* at 981, that Nebraska had ordered its primary contractor to reduce license review activities following a dispute with the Commission over federal rebate funds in 1995, *id.* at 983, that Nebraska had engaged in continuous but unsuccessful litigation over the location of the facility in Nebraska since 1992, *id.* at 986-87, that Nebraska had sought to prevent any consideration of the question of political bias in the contested case proceeding, *id.* at 988-89, and that EQ and HHS did not appoint previously uninvolved individuals to make the final departmental decisions until after the temporary restraining order issued. *Id.* at 989-990.[11]

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[11] Under Nebraska law, agency heads generally make the final decision in a contested case proceeding after receiving a recommendation from the hearing officer. *See* n.4 *supra*. After the temporary restraining order issued, both EQ and HHS made new appointments to ensure that uninvolved individuals would make the final decisions arising from the contested case proceeding.

The district court found that the Commission had made a sufficient showing of irreparable harm to support a preliminary injunction for two reasons: 1) costs for the contested case proceeding and the associated litigation, projected to amount to some $7.5 million that would be collected from US Ecology and passed on to the Commission, would likely be unrecoverable because of the Eleventh Amendment; and 2) Nebraska would likely try to use the results from the contested case proceeding to preclude consideration of issues in federal court. *Id.* at 992-93. The district court also found that the balance of harms and the public interest favored issuance of the injunction.

The district court concluded that none of the legal defenses relied on by Nebraska barred the issuance of an injunction. *See id.* at 995-96. Nebraska had waived its sovereign immunity by entering into the Compact, exhaustion of administrative remedies was not required because the Commission's interest in immediate judicial review outweighed Nebraska's interest in administrative autonomy, abstention doctrines did not apply because the Commission had made a substantial showing of Nebraska's bad faith, and the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), did not bar an injunction because the enjoined state proceeding was administrative rather than judicial. *Entergy Ark., Inc.*, 46 F. Supp. 2d at 995-96.

II.

Nebraska argues on appeal that the district court lacked jurisdiction over it, that the Commission failed to make the necessary showing for a preliminary injunction, and that the injunction violated the Anti-Injunction Act, but it does not challenge any of the district court's factual findings. The Commission responds that Nebraska waived its sovereign immunity by entering into the Compact, that the district court

had jurisdiction under *Ex parte Young*, 209 U.S. 123 (1908), that the injunction did not violate the Anti-Injunction Act, and that it made a sufficient showing of likelihood of success on the merits and irreparable harm to support a preliminary injunction.[12]

A.

Nebraska first argues that the claims asserted against it are barred by sovereign immunity and that it did not waive that immunity by entering into the Compact. Relying on cases such as *Edelman v. Jordan*, 415 U.S. 651, 673 (1974), and *College Savings Bank v. Florida Prepaid Postsecondary Educational Expense Board*, 119 S.Ct. 2219, 2228 (1999), Nebraska asserts that waivers of state sovereign immunity must be unequivocal and that the Compact language relied upon by the district court does not show unequivocal waiver.

The district court found that Nebraska had at least partially waived its Eleventh Amendment immunity. *See Entergy Ark., Inc.*, 46 F. Supp. 2d at 995. It determined that Article IV.m.8 and Article IV.e of the Compact specifically waived Nebraska's sovereign immunity as to actions brought by the Commission to enforce obligations arising under the Compact. The key language of Article IV.m.8 is as follows:

> The Commission shall . . . require all party states and other persons to perform their duties and obligations arising under this compact by an appropriate action in any forum designated in section e. of Article IV[.]

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[12] The Utilities have filed a brief in support of the Commission's arguments.

Article IV.e in turn provides a means by which the Commission may enforce the obligations of the parties:

> The Commission may initiate any proceedings or appear as an intervenor or party in interest before any court of law, or any Federal, state or local agency, board or Commission that has jurisdiction over any matter arising under or relating to the terms of the provisions of this compact.

Since the Commission was seeking to enforce obligations under the Compact, specifically Nebraska's obligation of "good faith" under Article III.f,[13] the district court concluded that the Eleventh Amendment did not bar the action. *Id.* The Commission continues to rely on Articles IV.m.8 and IV.e and argues that these provisions waive Nebraska's sovereign immunity in an action such as this.

Nebraska relies on two other provisions for the proposition that the exclusive enforcement remedy for the Commission under the Compact is to revoke a state's membership or suspend its privileges:

> The Commission may, by two-thirds affirmative vote . . . revoke the membership of any party state which . . . shall be found to have arbitrarily or capriciously denied or delayed the issuance of a license or permit to any person authorized by the Commission to apply for such license or permit[,]

Art. V.g, and

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[13] Article III.f provides that "Each party state has the right to rely on the good faith performance of each other party state."

> Any party state which fails to comply with the terms of this compact or fulfill its obligations hereunder, may, after notice and hearing, have its privileges suspended or its membership in the compact revoked by the Commission.

Art. VII.e.

It has long been recognized that a state may waive its Eleventh Amendment immunity. *See College Savings Bank v. Florida Prepaid Postsecondary Education Expense Bd.*, 119 S.Ct. 2219, 2226 (1999). A state may waive immunity by invoking the jurisdiction of a federal court or by making a "clear declaration" of its intent to submit to such jurisdiction. *See id.* (internal quotation marks and citations omitted). A state does not submit to federal jurisdiction by consenting to suit in its own courts, *see Smith v. Reeves*, 178 U.S. 436, 441 (1900), by stating its intent to "sue and be sued," *Florida Dept. of Health and Rehabilitative Serv. v. Florida Nursing Home Ass'n*, 450 U.S. 147, 149 (1981) (per curiam), or even by authorizing suits against it in "any court of competent jurisdiction[.]" *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 578 (1946). The question here is whether the language of the Compact constitutes a "clear declaration" of consent to suit in federal court.

The nature of the Compact supports the Commission's argument, for the Compact is a Congressionally sanctioned agreement which authorizes, and indeed requires, the Commission to enforce the obligations it imposes upon party states. *See College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 119 S.Ct. 2219, 2231 (1999). Nothing in the Compact states that revocation or suspension of a state's membership is the exclusive enforcement mechanism. The language in Article IV.e supports the Commission's argument that by entering into the Compact, Nebraska

consented to action by the Commission to enforce the Compact in federal court: "[t]he Commission may initiate any proceedings or appear as an intervenor or party in interest before any court of law, or any Federal, state or local agency board or Commission that has jurisdiction over any matter arising under or relating to the terms of the provisions of this compact." We conclude that by entering into the Compact, Nebraska waived its immunity from suit in federal court by the Commission to enforce its contractual obligations.

The Commission also argues that there is an alternate basis for jurisdiction under *Ex parte Young*, 209 U.S. 123 (1908). Under *Young*, a party may sue a state officer for prospective relief in order to stop an ongoing violation of a federal right. Injunctive relief remains generally available under this doctrine against continuing violations of federal law. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997). Nebraska argues against the assertion of jurisdiction under this doctrine on two grounds: 1) rights advanced by the Commission arise only under Nebraska law and state claims may not be enforced against state officials in federal court; and 2) injunctive relief under *Ex Parte Young* cannot be premised upon a finding of past misconduct.

While Nebraska is correct that violations of state law cannot be enjoined by a federal court under *Ex Parte Young*, *see Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984), the Commission is not attempting to enjoin a violation of state law. The rights that the Commission seeks to enforce are federal rights which arise under the Compact. The Compact provides that "[e]ach party state has the right to rely on the good faith performance of each other party state[,]" Art. III.f. It also requires that a state designated to host a regional processing facility "process all applications for permits and licenses required for the development and operation of any regional facility or facilities within a

reasonable period from the time that a completed application is submitted." Art. V.e.2. The Compact is federal law because it is a congressionally sanctioned agreement within the meaning of the Compact Clause. *See* U.S. Const., Art. I, § 10, cl. 3 *and Carchman v. Nash*, 473 U.S. 716, 719 (1985). This court has already held that this Compact is "a creature of federal law." *County of Boyd v. US Ecology, Inc.*, 48 F.3d 359, 361 (8th Cir. 1995) (citations omitted). Nebraska's argument that the Commission is trying to enforce only state law must be rejected.

Nebraska's argument that injunctive relief under *Ex Parte Young* cannot be premised on proof of past misconduct by the state is similarly without merit: such relief "is available where a plaintiff alleges an *ongoing* violation of *federal* law, and where the relief sought is *prospective* rather than *retrospective*." *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 294 (1997) (O'Connor, J., concurring) (emphasis in original). While the relief granted under *Ex parte Young* may only be prospective, proof for the claim necessitating relief can be based on historical facts, and most often will be. *See, e.g., Edelman v. Jordan*, 415 U.S. 651 (1974) (state had failed to provide aid within federally imposed time limits).

The district court had jurisdiction to issue its injunction. By entering into the Compact, Nebraska waived a portion of its sovereign immunity. The district court also had jurisdiction to enjoin state officers under *Ex parte Young* because the relief was solely prospective and because the Commission made a sufficient showing of Nebraska's ongoing violation of federal law.

B.

The relevant factors on a motion for a preliminary injunction are: "(1) the probability of success on the merits;

(2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the issuance of an injunction is in the public interest." *Sanborn Mfg. Co., Inc. v. Campbell Hausfield/Scott Fetzer Co.*, 997 F.2d 484, 485-86 (8th Cir. 1993) (citing *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). "A district court has broad discretion when ruling on requests for preliminary injunctions, and we will reverse only for clearly erroneous factual determinations, an error of law, or an abuse of that discretion." *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1179 (8th Cir. 1998) (citation omitted).

Nebraska argues that the district court erred in issuing the preliminary injunction because the Commission has shown neither that it is likely to succeed on the merits of its claim nor that it would suffer irreparable harm if an injunction were not granted. The Commission responds that it is likely to succeed on the merits and that it will be irreparably harmed if the state administrative proceeding is not enjoined because it will not be able to recoup the costs of that proceeding and because it could be collaterally estopped by it.

The Commission asserts that it has made a sufficient showing of likelihood of success on the merits because it has shown both that Nebraska wrongfully delayed and denied US Ecology's license application in violation of its obligations under the Compact and that the district court has jurisdiction to grant the equitable relief it seeks. In response, Nebraska reiterates its jurisdictional arguments, asserting that the Eleventh Amendment bars any relief against the state of Nebraska or its officers and that the Compact only authorizes the Commission to seek relief by means of a hearing to revoke its membership.

We have already rejected Nebraska's Eleventh Amendment argument, and there is sufficient evidence in the record to support the district court's factual findings and its conclusion that the Commission has shown a likelihood of success on the merits. This includes evidence of interference in the licensing process by Nebraska's executive branch, delay and excessive expenditures fostered by the state, and the denial of the second license application on an apparent pretext.

Nebraska argues that the district court erred in finding irreparable harm. It asserts that litigation costs, even if unrecoverable, can not constitute irreparable injury and that any injury arising from issue or claim preclusion is speculative because it depends on the outcome of a proceeding that has yet to take place. The Commission responds that it is being taxed under the applicable state regulations not only with its own litigation costs, but also with those of Nebraska. This distinguishes its situation from the general American rule in which litigants are required to pay only their own costs.[14] The Commission further argues that the assertion of issue preclusion by Nebraska is not speculative in light of the record.

Injunctive relief is appropriate when legal process is used not to provide an impartial forum for the resolution of legal disputes, but rather to impede the exercise of federal rights. *See Dombrowski v. Pfister*, 380 U.S. 479, 489-90 (1965). Although federal courts are generally reluctant to interfere with ongoing state administrative proceedings, *see Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc.*, 477 U.S. 619, 627 (1986), the deference owed such proceedings does not apply if they are used to harass or discourage the exercise of a federal right. *See Younger v. Harris*,

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[14] *See Neb. Rev. Stat.* § 81-1579(2) (1999 Reissue) (requiring potential licensee to pay all costs associated with licensing).

401 U.S. 37, 48 (1971). Such abuse of legal process "sufficiently establish[es] the kind of irreparable injury, above and beyond that associated with the defense of a single prosecution brought in good faith, that had always been considered sufficient to justify federal intervention." *Id.* To show this type of injury, a party must show that state officers abused the legal process, either to further a forbidden purpose or to discriminate against a particular group. *See id.*; *see also Lewellen v. Raff*, 843 F.2d 1103, 1112 (8th Cir. 1988).

The Commission has met that standard here. The party states, the Commission, and US Ecology had the right under the Compact to fair and impartial consideration of US Ecology's license applications. The Commission has submitted substantial evidence which tends to show that Nebraska did not provide, or intend to provide, impartial consideration of those applications. Nebraska has instead used its administrative process wrongfully to delay and deny the license, at considerable expense to US Ecology, the Commission, and the Utilities. Under these circumstances, the deference generally due a state's administrative proceeding does not apply. The Commission has made a sufficient showing of Nebraska's abuse of the administrative process to demonstrate irreparable harm.

The importance of preliminary injunctive relief is heightened in this case by the likely unavailability of money damages should the Commission prevail on the merits of its claims. Relief in the form of money damages could well be barred by Nebraska's sovereign immunity. *See Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997). The expense of prosecuting an action through administrative proceedings does not generally constitute irreparable harm, even if unrecoverable. *See FTC v. Standard Oil of Calif.*, 449 U.S. 232, 244 (1980) *and Renegotiation Bd. v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 24 (1974). Nevertheless,

in a case such as this, in which costs far exceed those incident to ordinary litigation because of the conduct of one of the parties, it is appropriate to assess those costs in considering injunctive relief. All the costs of the contested case proceeding would have to be paid by US Ecology and then passed on by contract to the Commission and the Utilities. Some $74 million has already been spent, with another $650,000 projected to be spent in just the first three months of the contested case proceeding. None of these additional costs would be recoverable in the event of Nebraska's successful assertion of sovereign immunity.

The other *Dataphase* factors do not weigh against the preliminary injunction. The district court's finding that Nebraska would suffer no harm if the injunction were granted is not contested on appeal. The only harm posed to Nebraska seems to be the interruption in its licensing proceeding during the time between the issuance of the preliminary injunction and the resolution of the merits. Any such harm seems negligible considering the time that has already passed since US Ecology's initial license application. In a finding not challenged on appeal, the district court found that the public interest favors the issuance of the preliminary injunction, and we agree. This case affects not only Nebraska residents, but also residents of Kansas, Oklahoma, Arkansas, and Louisiana, who also have interests under the Compact.

After thorough consideration of the record and the relevant factors, we conclude that the district court did not abuse its discretion in issuing the preliminary injunction.

C.

Finally, Nebraska asserts that the district court order violated the Anti-Injunction Act. Nebraska argues that the preliminary injunction effectively operates against the Ne-

braska state courts because its administrative process allows for appeal to its courts under *Neb. Rev. Stat.* § 84-917(2)(a) (1996 Reissue). The Commission responds that the federal statute applies by its own terms only to state court proceedings, not to state administrative proceedings. The question of whether the Anti-Injunction Act applies to administrative proceedings is an issue of first impression in this circuit.

The Anti-Injunction Act provides that "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1994). Its plain language refers only to injunctions issued by federal courts "to stay proceedings in a State court." *Id.* While the Supreme Court has expressly declined to address whether the Anti-Injunction Act applies to state administrative proceedings, *see Gibson v. Berryhill*, 411 U.S. 564, 573 n.12 (1973), every circuit to have addressed the question has held that it does not. *See Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1271 (9th Cir. 1995); *Kerr-McGee Chemical Corp. v. City of West Chicago*, 914 F.2d 820, 824 (7th Cir. 1990); *American Motor Sales Corp. v. Runke*, 708 F.2d 202, 204-05 (6th Cir. 1983); *and Engelman v. Cahn*, 425 F.2d 954, 958 (2d Cir. 1969); *see also SMA Life Assurance Co. v. Sanchez-Pica*, 960 F.2d 274, 276 (1st Cir. 1992). Moreover, the purpose underlying the statute is the prevention of unnecessary friction between state and federal courts. *See Atlantic Coast Line R.R. Co. v. Bhd. of Locomotive Engineers*, 398 U.S. 281, 287 (1970). An injunction related to an administrative proceeding does not impact the state courts. The argument that the result of such a proceeding might end up in state court is speculative at this point, and the injunction here does not implicate the Nebraska courts. Both the text of the statute and its purpose support the conclusion that the Act ap-

plies only to state courts and not to state administrative agencies.

Nebraska argues that the agency administering the contested case proceeding is the equivalent of a "state court" for purposes of the Anti-Injunction Act because the proceeding is judicial in nature. This argument is without merit, as shown by decisions of the Nebraska Supreme Court. Although "the exercise of discretion to grant or deny a license . . . is a quasi-judicial function[,]" *Stoneman v. United Neb. Bank*, 577 N.W.2d 271, 277 (Neb. 1998) (citation and internal quotation marks omitted), "[a]dministrative agencies are not courts." *Nebraska ex rel. Stenberg v. Murphy*, 527 N.W.2d 185, 193 (Neb. 1995) (citation omitted). "State agencies may perform functions of a judicial, quasi-judicial, or factfinding character; however such agencies are extrajudicial bodies, not courts, judges, judicial bodies or officers. The proceedings of such agencies are not judicial and are without judicial effect." *Id.* (citation omitted). This court can see no reason to accord greater dignity to the proceedings of a Nebraska state administrative agency than its highest court would. The Anti-Injunction Act maintains the equal dignity of the state and federal courts. Because that purpose is not thwarted here, we hold that the Act does not bar the preliminary injunction issued by the district court.

IV.

After a thorough review of the record, we conclude that the district court had jurisdiction to issue injunctive relief, that it did not abuse its discretion in issuing the injunction, and that it did not violate the Anti-Injunction Act. Accordingly, we affirm the preliminary injunction issued by the district court.